84-1557

Office Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

JOHN H. HOWKINS Esq. PETITIONER

v.

SAM S. CALDWELL AND J. FREEMAN RAILEY
EACH & BOTH, INDIVIDUALLY & OFFICIALY
DEFENDANTS

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE 11th. CIRCUIT

JOHN H. HOWKINS (ATTORNEY)
2954 ROCKINGHAM DRIVE N.W.
ATLANTA, GEORGIA 30327

Pro se petitioner

EDITOR'S NOTE

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IN THE SUPREME COURT
OF THE UNITED STATES

JOHN H. HOWKINS,	)
	)
Plaintiff,	)
	)
v.	)
	)
SAM S. CALDWELL, et al.,	)
	)
Defendants.	)

PETITION FOR CERTIORARI

I. Question Presented:

Whether the order which dismissed Petitioner's action in the United States District Court for the Northern District of Georgia, Atlanta Division, on grounds of res judicata and collateral estoppel, Howkins v. Caldwell, et al., 584 F.Supp. 98 (1983), conformed to the prior decisions of the Supreme Court under the 14th Amendment to the Constitution of the United States and 42 U.S.C. 1983. The ruling was based on a state administrative decision and a state trial court affirmance of that officer's

decision down grading petitioner from his position as Chief Hearing Officer for the Unemployment Division of the Georgia Department of Labor (U.I. div., GDOL) grade 39 and placing him in grade 36 as a U.I. hearing officer. The evidentiary hearing was so deficient as to deprive petitioner of a valuable property right without due process of law.

II. Parties

The parties are named in the caption of this case, except for the party sued for continuing harassment (Edward Fulford), which claim remains to be tried after the Supreme Court renders its ruling on this petition. Also, the new Commissioner of Labor, Joe D. Tanner, will be added in his official capacity as the state official to make reinstatement. The liability insurance carrier for protecting state officials (or the fund therefore) has not been named in view of its vicarious character [OCGA 45-9-4 and 50-5-51(b)].

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Initial Decision Appendix 10

2. State Personnel Board

Howkins v. Department of Labor

Decision Appendix 11

3. Order, Superior Court of Fulton County, Howkins v. Georgia Department of Labor, (C-77783) entered 2 Mar 83 Appendix 12

4. Howkins v. Caldwell et al, 584 F. Supp 98 (1983)

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V. Jurisdiction Of The Supreme Court

The original judgment of the District Court for the Northern District of Georgia, dismissing petitioner's cause of action on grounds of res judicata and collateral estoppel was entered on October 14, 1983. The amended order of dismissal was entered on January 17, 1984. This order affirmed and republished the first one, but held part of the cause of action, based on a continuing harassment of petitioner on the job, for later trial, but also stayed further action on that branch of the case until the main complaint was settled. Petitioner then appealed to the Court of Appeals for the 11th Circuit for reversal of the order of dismissal but the court per curiam affirmed the district court and entered that judgment on November 27, 1984. A petition for rehearing was filed but the Court of Appeals then denied that petition, and entered the order of denial on January 4, 1985. This petition for review by

certiorari is filed under Supreme Court Rule 20 in accordance with the time limit prescribed by 28 U.S.C. § 2101(c). The jurisdiction of the Supreme Court to review this case is grounded upon Amendment I, and Amendment XIV § 1 of the Constitution of the United States (the due process clause), 28 U.S.C. § 1983, and Rule 17 of the U.S. Supreme Court Rules permitting a petition to invoke the supervisory powers of the court to enforce its previously announced rule of decision permitting a citizen to invoke federal jurisdiction when there has been a deprivation of a property right without due process of law.

VI. Constitutional Provisions and Statutes

Amendment I - Freedom Of Religion, Speech And Press; Peaceful Assemblage; Petition Of Grievances.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

Amendment XIV - Citizenship; Privileges And Immunities; Due Process; Equal Protection; Apportionment Of Representation; Disqualification Of Officers; Public Debt; Enforcement.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisidiction the equal protection of the laws.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Jurisdiction Below

The District Court acquired jurisdiction of this action on grounds of the 1st Amendment, the 14th Amendment, and Code Section 42 U.S.C. 1983. The state had deprived plaintiff of his civil rights by taking a property right in his job without due process of law.

2. Background.

Petitioner had filed this action seeking a jury trial on the claim that he had been improperly downgraded from his position as Chief Hearing Officer for the Unemployment Insurance Division, Georgia Department of Labor, removing him from all supervisory responsibilities and privileges, and placing him in a lower grade hearing

officer position, at a loss of salary of approximately $200.00 per month at that time. This act followed by two working days a protest by the petitioner by telephone on December 4, 1980, to his direct supervisor, the Unemployment Insurance Director, that something irregular was taking place on the floor where the hearing officers were conducting unemployment hearings. A higher ranking employee, an attorney, had appeared to advocate against a claimant before a hearing officer and this same man was also an instructor and participated in the training of these hearing officers. The Director of the UI Division told the petitioner that he should mind his own business and keep his nose out of that case. Petitioner had also suggested, by memo of December 1, 1980, (Appendix 1) to the Director, that a Board of Review decision was erroneous and the Commissioner should be so advised with a view towards

court review as provided by state law[1/]. Petitioner had a duty to do this as shown by the United States Department of Labor supervising authority (Appendix 2). Two days after the telephone conversation about the staff attorney, your petitioner was told by the director that he should step down as Chief Hearing Officer.

The staff attorney assigned to do this undercover advocating on the part of the commissioner had frequently told the hearing officers not to recognize him or use any terms of familiarity with him when he came into the hearing room to do his job. A later check revealed that the attorney on the other side of the case had

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1/ Ga. Code 54-619 [now O.G.C.A. 34-8-176(b)] states in part "As a guide for future interpretation of the law, when the commissioner is aggrieved by or deems any decision of the board of review contrary to the law, and no other party enters on appeal therefrom, he may, within 20 days after such decision has become final, appeal and certify to the superior court questions of law therein involved, and said court shall consider and determine the same and enter a decree accordingly which shall be subject to further appeal by the commissioner.

no knowledge that he was actually opposing a staff attorney who outranked the hearing officers and frequently gave them instruction on how to do their jobs. This staff attorney also appeared on the floor about five days later and spent 40 minutes in the office of the particular hearing officer involved and induced her to change the decision that she was prepared to render, as she had explained to your petitioner before it became known that he was to step down and was no longer to be Chief.

(a) The Charge

The Commissioner of Labor, Sam Caldwell, was asked why petitioner was to step down. The commissioner stated very directly that he asked no one's permission to promote petitioner to the job and he was not asking anyone's permission to demote petitioner. No other reason was given. Petitioner was approached by several of the commissioner's lieutenants after this and

one in particular emphasized that Commissioner Caldwell had given everyone in the Labor Department his job and everyone understood that they were supposed to do as the commissioner said do, and if it were time for me to step down then I should step down without protest.

On December 31, 1980, petitioner was handed a letter informing him that another person would take over the helm of the hearing section starting with the first working day in January, 1981. (See Appendix 3).

(b) The Hearing

Up to this point there had been no discussion about why the downgrade was ordered, other than the three brief conversations mentioned above. However, in the intervening two months before the hearing on the appeal to the Merit System Hearing Officer, there had been a beehive of activity to round up every one of my "subordinates" who owed loyalty to the

commissioner and understood his political influence and his ability to adversely affect their pay grades. Everyone of them had worked in his political campaign or contributed heavily to it at one time or another. The facts that these individuals presented in evidence, alleging inefficiency on the part of the petitioner, were items that the petitioner was hearing for the first time. The only conversation he had had with the Director of the UI Division about running his operation was how to handle complaints raised by one individual hearing officer, and the director explained how it was necessary to be firm and sometimes unpopular with decisions rendered in guidance of these subordinate officers. The Division Director took full advantage of this in the hearing.

Cross examination of the UI Division Director in the hearing produced little results, but not surprisingly so in view of

the fact that he himself was a convicted felon with an arrest record that covered his activities both before and after he had joined the Georgia Department of Labor[2/]. Petitioner was not permitted to act as co-counsel (as an attorney) for himself. The hearing officer stated "you have your attorney."

(c) Susceptability To Influence

The quality of evidence needed in the Merit hearing to uphold the downgrade is limited according to judicial decision in Georgia to the "any evidence rule". Hall v. Ault, 240 Ga. 585, 242 S.E.2d 101 (1978). In view of the fact that every single person on the accusative side of this case in front of the hearing officer had a very close relationship with the commissioner, either having worked on his political campaign, or was personally a friend, there seemed little doubt as to the

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2/ This director had been arrested and was convicted on a federal drug peddling charge in 1971, and served a prison sentence.

outcome of the Merit System hearing[3/] The hearing officer himself was not "at arm's length" in conducting this hearing, as it is also a known fact that the Chairman of the Merit System Board (his supervisor) owed favors to the Commissioner of Labor because the Commissioner had employed individuals as requested by that Chairman (See Appendix 4). The payroll controlled

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[3/] The credibility of the witnesses against petitioner show additional taint in the fact that the Commissioner of Labor had been called before a federal grand jury in 1974 and many witnesses against him had admitted at that time their activities in soliciting votes for him while on department payroll time. The deliberations of that jury were called to Washington and nothing became of their investigation. It was well known that Mr. Sam Caldwell and Mr. Herman Tallmadge were of the same political faction and worked closely together and supported each other in their specific areas of election activity. However, the 1982 federal grand jury was not bothered by anyone in Washington pulling for Mr. Caldwell and he was indicted, tried and convicted of sinking a boat for its insurance value. (See also Appendix 6). He has also been convicted under state law for conspiracy to defraud the state (using state employees to repair a boat), case State v. Caldwell, et al., Criminal docket A-68603 Fulton Superior Court, 5 year sentence, judgment entered April 25, 1984.

by Mr. Sam Caldwell at times amounted to over 3,000, funded by the federal government, under the rules and regulations of the Georgia Department of Labor, as approved by the U.S. Department of Labor. As vacancies occurred the Commissioner would see that any important requests for placement help were taken care of as the loyalty gained would demand. The obligation of this Chairman of the Board did not go unnoticed, but had been yielding fruit long before it was discovered (See Appendix 4). That Mr. Caldwell had also used his employees in extensive political activity has been proven, by court conviction since that time. Approximately 20 individuals have been sent to jail since 1981 for organizing fund raising and vote getting rallies and then lying about it (See Appendix 5).

By 1976, Mr. Caldwell had become "king maker" in Georgia politics. He used his labor department employees, especially

those who are assigned in the field to talk to employers about their taxes, to influence and organize many groups of individuals, especially employer groups, and formed alliances to support various political figures running for other state offices. Mr. Caldwell's only mistake was that he supported Representative Bo Ginn for governor which turned out to be the wrong choice. The new governor and his regime proceeded with indictments and obtained convictions. The federal district attorney general has stated that Mr. Caldwell has been illegally in business in order to enrich himself ever since he took over the Georgia Department of Labor in 1968 (See Appendix 6). The commissioner had been strong enough through his organized labor support and his employer contact (illegal) organization to materially affect many political decisions on Capitol Hill. Since the governor is limited to two terms, there was no one to

balance his influence provided he stayed on good terms with each new one. Only court action by a hostile governor proved effective (See Appendix 7).

(d) Created Evidence

Notice was given to petitioner that he was no longer to be the head of the appeals section on December 8, 1980. This was put in writing on December 31, 1980. At this point the only notice given to him was that he was "to step down" and the direct statement from Commissioner Caldwell that he had made the decision and "I do not need to justify it to anyone." Notice of all the charges that were brought up in the hearing did not come until a month or so later. The administration of the labor department had plenty of time to round up everyone who had worked for the commissioner or in some other way was closely connected with his own destiny. One witness was called in that had left the section almost a year and a half before the

incident, and the record clearly shows that petitioner had been rated above average in performance since her departure. However, her evidence had been taken, along with all the others, about petitioners "inefficiency." This clearly shows that there were some subordinates who felt that they had been dealt with too firmly, or not in the way they would like to have been dealt with by their supervisor: really a popularity contest between the Commissioner and this petitioner. (see Appendix 9)

Accusations presented by such an array of subordinates hardly seems appropriate in this type case. The only superior there was the UI Division Director, the one to whom petitioner had suggested that the staff attorney should have not made the appearance that he did. Also, there was the staff attorney to whom I have referred about appearing and advocating without revealing his special relationship with the hearing officer. One member of the Board

of Review also appeared. This member of the Board was directly questioned by the hearing officer conducting the hearing and it was the only occasion in which this hearing officer undertook to do any examination himself. By the nature of his questions, it is clear that he misunderstood the relationship between the Unemployment Board of Review and your petitioner, who was then the chief of the U.I. hearing officers section, supervising approximately 14 hearing officers. Confusion in the Georgia law may have led this hearing officer to the assumption that the Board of Review was my supervising authority (See Appendix 8). The Board did not nor has ever appointed a "referee" (UI hearing officer). Petitioner had been called up to the Board of Review about two weeks prior to this downgrading action and Petitioner informed them that a conflict seemed to be developing between himself and the UI Division Director. The Board

members, all three being present, stated that they had absolutely no control over the administration of the Appeals Section, that their job was simply to review decisions concerning unemployment benefits that had been referred to them by appellants. Other than this technical function they had absolutely no administrative control.

The above stated sequence of events shows that the downgrading action had no relationship at all to the complaints presented in the hearing. They were all generated after petitioner had been verbally told to stand down, and control had been vested in another person (See Appendix 3). Since the manufactured evidence presented at the hearing had nothing to do with the real reason that the petitioner was told to step down, a thorough cross examination might have brought out the truth and defeated the burden of proof, which is placed on the

authority making the demotion. The proof offered did not follow the cause given as reason for the action, and cross examination was cut short when petitioner was denied a right to participate.

(e) The Decision

The hearing officer concluded that the downgrade was justified and on June 12, 1981, issued his order affirming the downgrade (Appendix 10). Petitioner then sought a full Board review, but they summarily affirmed the finding of the hearing officer. This hearing officer was also the administrative secretary to the Board. (Appendix 11)

(f) Court Summary Review

Petitioner then filed for a review by the Fulton County Superior Court, in accordance with Georgia law. This is a first level trial court of general jurisdiction in the state. In its appellate function, however, it is limited in three major aspects. It cannot review a

constitutional question unless that question was raised in front of the administrative hearing officer who rendered the first decision, and it can only review the findings of the administrative hearing officer under the "any evidence" rule[4/]. This has been interpreted in Georgia as some evidence. Petitioner had mistakenly interlined the constitutional question by pen and ink as an addition to his petition before he realized that the trial court had no jurisdiction to consider the matter. Petitioner so informed the court before the proceedings started and announced that the constitutional question would not be pressed and the pleading should be amended to remove it. Amendment to pleadings is allowed under the Georgia Rules of Trial Procedures at any time prior to judgment[5/].

4/ Hall v. Ault, 242 S.E.2d 101 (1978).

5/ O.C.G.A. 9-11-15(a) Amendments. A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. Thereafter the party may amend his pleading
(footnote continued)

However, the judge preferred to make a finding that petitioner had "waived" his constitutional claims. The judge also found that petitioner had been able to represent himself, contrary to the actual occurrences before the hearing started in front of the hearing officer when petitioner was told that he absolutely could not enter into any of the questioning of witnesses. The court also refused to consider any claims of bias because he interpreted Georgia decision as requiring that such complaint also be raised first before the hearing officer. The judge issued his decision on March 2, 1982 (See Appendix 12) affirming the ruling of the hearing officer.

(g) In The District Court

The petitioner then filed his claim in the District Court for the Northern District of Georgia on October 21, 1982,

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(footnote continued from previous page) only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

showing that he had been deprived of a valuable property right contrary to the requirements of the 14th Amendment to the Constitution of the United States and under 42 U.S.C. 1983. The District Court reviewed the evidence transcript, a rather lengthy volume, and granted defendants' motion for dismiss based on res judicata and estoppel. Howkins v. Caldwell, supra. The 11th Circuit Court of Appeals affirmed the dismissal (Appendix 13 and 14) and petitioner now seeks the protection of the Supreme Court in this matter.

ARGUMENT

I. Property Right

Petitioner has a property right in the form of his job with the labor department of Georgia such as to require due process of law before that right may be removed. Brownlee v. Williams, 233 Ga. 548, 555, 212 S.E.2d 359 (1975); Scott v. Undercoffler, 108 Ga.App. 460, 463; City of Jesup v. Bennett, 226 Ga. 606, 176 S.E.2d 81 (1970).

II. Qualified Immunity

All persons named in their individual capacity do not have qualified immunity in this case because the actions they took were without authority of law, having no basis grounded on the law under which they allegedly took these actions. It is up to the individuals accused to show by an affirmative defense that the actions they took were within the scope of their authority. Espanola Way v. Meyerson, 690 F.2d 827 (1982).

III. Due Process and Exhaustion

As noted above, the notice given to petitioner as to the reasons for stepping down had nothing to do with the reasons that were developed in the appeal hearing in front of the merit system hearing officer about two months later. This is also a defect appropriate for consideration under the Due Process clause, because a hearing that turns into a popularity contest between a subordinate and his

Agency head based on evidence garnered after the fact could hardly render the constitutional process that is due under the 14th Amendment.

Constitutional Question Precluded

The courts in Georgia have precluded the consideration of a constitutional complaint that develops out of administrative procedures unless that complaint is first raised to the tribunal in front of which the hearing is conducted. As it said in Burnett v. Burnett, et al., 209 Ga. 353, 72 S.E.2d 459, (1952), "a question of constitutional law not raised in the tribunal, the judgment of which is under review, but alleged in the bill of exceptions...to the superior court from an award of the State Board of Workers' Compensation, is not properly raised for decision in a writ of error to this (the Georgia Supreme) Court."

Also, "under repeated rulings of this court, the constitutional question was not

timely raised as to confer jurisdiction of the appeal on the Supreme Court" (attacking the constitutional procedures in front of the Workers' Compensation Board), Elson's Book Store v. Buice, 227 Ga. 170, 179 S.E.2d 250 (1971). "Under our decisions the challenge must first be made before the agency." "Sparks raised his constitutional attack on the notice of appeal provision of Code Ann. Section 54.612(3) for the first time in the Superior Court. . . .His challenge comes too late." Sparks v. Caldwell, 244 Ga. 530, 261 S.E.2d 590 (1979). The district court overlooked this peculiar site, and the danger imposed upon all who might use it and cause antagonism to rebound against their interest, especially in view of the very limited judicial supervision available to insure against it. See, Patsy v. Florida, (infra). Under the legal rules of Georgia, the Superior Court thus could not acquire jurisdiction over the constitutional issue

allegedly raised in the Superior Court and allegedly "withdrawn" by the petitioner (Appendix 12). The language used by the state court seems to constitute nothing more than a decoy to divert the question from the real issue. The rule is so restrictive that it raises a presumption for constitutionality to a level of absoluteness. This is perhaps why the U.S. Supreme Court held that exhaustion of administrative remedies is not required when a substantial question of constitutional law has been raised to challenge the proceedings. King v. Smith, 392 U.S. 309, 20 L.Ed,2d 1118, note 4 at p. 312 (1968). The court has also dealt with the question of timeliness in raising a constitutional attack on the procedures used. "The fact that Eldridge failed to raise with the Secretary his constitutional claim...is not controlling." Matthew v. Eldridge, 424 U.S. 319, 329; 47 L.Ed.2d 18 (1976). In Kaufman v. Board of Trustees, Community

College, 552 F.Supp. 90 (1981), the court said:

> "In the case at bar, however, the plaintiffs challenge the constitutionality of the very rule under which they are to be judged. The hearing officer or arbitrator is not empowered to rule on the constitutionality of the rule on its face or as applied and, indeed, any ruling to that effect that may be made in the context of the hearing may not be binding on the Board in other proceedings. . . .It would therefore be futile to require plaintiffs to raise their constitutional objections in a section 3B-4 hearing before being permitted to challenge the constitutionality of the ban on concurrent full-time employment in this Court. To the extent that they could raise the constitutional issues before the arbitrator, there is no guarantee that plaintiffs could obtain the relief sought even if the arbitrator or hearing officer agreed with them. Moreover, requiring exhaustion in this case would not appreciably aid the development of a factual context in which the constitutional issues might be addressed.

(id. at 94).

"The Supreme Court has held on numerous occasions that state administrative remedies need not be exhausted prior to commencing a federal civil rights action under 42 U.S.C. Section 1983 (cites

omitted). . . .(Exhaustion) "should not be given 'wooden application'. . . . Exhaustion is not required where it would be futile because the question of the adequacy of the administrative remedy is 'for all practical purposes coextensive with the merits of plaintiff's constitution of claims' [citing Feuntes v. Roher, 519 F.2d 379, 387 (2d Cir. 1975)], or where the issue is one where there is no need for 'exercise of agency discretion or expertise' Touche Ross & Co. v. Securities & Exhange Commission, 609 F.2d 570, 577 (2nd Cir. 1979). . . ." Silver v. Woolf, 538 F.Supp 881, 883-84 (1982), U.S. cert. denied, 103 S.Ct. 1525; see, also, Patsy v. Florida Board of Regents (infra). Petitioner needs a proper evidentiary hearing and not a state run around at the very door of the federal court.

The District Court's reliance on Jones v. Gann, 703 F.2d 513 (11th Cir. 1983) seems misplaced, as that case referred to a

state Superior Court trial of the issue below and dismissed as res judicata the claim against the City of Marietta and its mayor. No attack had been made on procedures employed in the trial of the case.

The District Court used Kremer, supra, Allen, supra, and Montana, supra, as if there were acceptance of the procedure used to decide the trial of those issues without a detailed review of such procedures for their adequacy. Howkins at 104 and 105. In Kremer and Allen, the prior trials were had under federal law and the Supreme Court, on the appeal, made detailed findings as to such procedures and found them to be adequate. There was no summary review by an intervening court that was too opaque for their scrutiny, and there was no "any evidence" rule of summation in the prior holdings. But even if the District Court was correct on that branch of its decision (which is not admitted), the

decision in Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) overturned the basis for this argument.

Meaningful Hearing

In Goldberg v. Kelly, et al., 397 U.S. 254 (1970), 25 L.Ed.2d 287, at page 270, the Supreme Court quoted Greene v. McElroy, 360 U.S. 474, 496-497 (1959) to show that the evidence should be presented to the individual to insure that he has a right to disprove the government's case. "While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, (emphasis added) vindictiveness, intolerance, prejudice, or jealousy." In McElroy, therefore, the U.S. Supreme Court put its finger right on one of the paramount issues that has given rise to this case (See Appendix 5). The evidence was switched

entirely from what it was when petitioner was first told to step down compared to that presented on the hearing about two months later. In the hearing, the petitioner faced his superior, a convicted felon, and one member of a collateral line of authority, the Board of Review, but the other ten or twelve were subordinates to the petitioner, and took advantage of the request that they vent any resentment that they might have had against their superior, no matter how insignificant the occurrence might have been. This trumping up of charges was done and presented by people who had worked for or had contributed to Commissioner Caldwell's campaign and they did it out of loyalty to him to get the results he wanted.

An Unbiased Hearing Examiner

Public outcry has been raised in Georgia about the disclosures showing the favors garnered by Commissioner Sam Caldwell in the form of finding jobs for

persons who had friends or relatives whom they would like to see go to work and earn a living (See Appendix 4). The large payroll, federally funded through Georgia procedures, of in excess of 3,000 personnel could be used for this purpose and was continually used for this purpose. The Chairman of the Board which approved hearing officers for appointment had been drawn into this swirl of influence. The governors in former times had also received favors from the Commissioner as had many members of the legislature. The legislature had shown their particular interest in Commissioner Sam Caldwell by raising his salary to a higher level than any other state labor commissioner in the U.S. The politicians in control of Capitol Hill through the Governor also controlled the appointment of the Personnel Director and all of the Board members. These in turn appointed the Merit System hearing officers. A hearing officer could be fired

at anytime and told to move out before sundown. Since his main job was to hear complaints against members of the political faction that controlled the state administrative agencies it seemed highly unlikely that he would ignore their obvious preferences in the treatment of downgrade and discharge appeals of persons accused by these department heads of some infractions, be it major or minor.

The objectivity of the initial decision maker was therefore highly suspect. The Supreme Court has pointed out that "impugning motives" is perhaps less important than "detachment" of the hearing officer. In Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 (1972), the Supreme Court reviewed a decision by a parole officer against a parolee for whom he had been responsible but who had broken parole. The court recognized the assumed hostility against the parolee and stated "realistically the failure of the parolee is in a

sense a failure of his supervising officer. However, we need make no assumptions one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making the recommendations cannot always have complete objectivity in evaluating them. Goldberg v. Kelly, supra, found it 'unnecessary to impugn the motives of the caseworker to find a need for an independent decision maker to examine the initial decision'" (At 486). The court went on to state the necessity for a "neutral and detached" hearing body to examine the issues (id at 489). A hearing officer in Georgia that is appointed by the very faction of government that seeks his decision in their favor can hardly be said to be neutral. Continuous employment has been enjoyed by the hearing officers, and if the politicians find that they are too

liberal in upholding complaints against government agencies, they obviously will enjoy a very limited future in their jobs.

A similar situation arose in Gibson v. Berryhill, supra. The members on the factfinding board in this optometrist's case had a definite interest in the outcome because they were deciding against the practice of optometry by persons employed by corporations as opposed to optometrists who were self-employed. The Board members pecuniary interest "had sufficient substance to disqualify them, given the context in which this case arose" (at 579). In a slightly different context, but with the same import, it was stated in Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 59 L.Ed.2d 401 (1979) "in discharging their duties as officials of TRPA, the state and county appointees necessarily have also served the interests of the political units that appointed them."

The actual appointment of these personnel system hearing officers in Georgia neither satisfies justice nor the appearance of justice. "But our system of law has always endeavored to prevent even the probability of unfairness. . . .'every procedure which would offer a possible temptation to the average man as a judge . . . . not to hold the balance nice clear and true between the state and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532; 71 L.Ed. 749, 758". "Justice must satisfy the appearance of justice" Re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1954).

"That a trial by a biased judge is not in conformity with due process is sustained by the authorities. In Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 479, 50 A.L.R. 1243, the court said: 'no matter what the evidence was against him, he had the right to have an impartial judge'. The

principal is aptly stated in People v. Naimark, 154 Appeal Division 760, 139 NYS 418, where it is said '. . .The first idea in the administration of justice. . .is that a judge must necessarily be free from all bias and partiality.' National Labor Relations Board v. Phelps, 136 F.2d 562, n. 1 at 563 (5th Cir. 1943). The court went on to say "Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head its

effect remains throughout the whole proceeding" (id at pp. 563-564).

"The very purpose of (Section 1983) was to interpose the federal courts between the states and the peoples as guardians of the peoples federal rights - to protect the people from unconstitutional action under the color of state law 'whether that action was executive, legislative or judicial'". Patsy v. Florida Board of Regents, 457 U.S. 496, at 503 (1982), quoting in part Mitchum v. Foster, 407 U.S. 225, 242, (1972).

The Supreme Court reviewed a number of decisions where a biased hearing officer was obviously involved in the opinion Vitek v. Jones, 445 U.S. 480, 63 L.Ed.2d 552 (1980). This concerned the decision of a state to transfer a prisoner to a mental institution, and the court found that this action did in fact place a stigma against his name. The questioned raised was whether the decision had been made by an independent decision maker. "In Morrisey,

Gagnon, & Wolff, the state had adopted their own procedures for determining whether conditions warranting revocation of parole, probation, or good time credits had occurred; yet we held that those procedures were constitutionally inadequate. In like manner, Nebraska's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting a transfer exist, neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution." (id. at 491). Among the seven criteria outlined by the Supreme Court was "an independent decision maker." (id. at 495). In his concurring opinion, Mr. Justice Powell stated "the essential requirements are that the person provided by the state be competent and independent, and that he be free to act solely in the inmates best interests." (id. at 500).

Appointment Of The Georgia Hearing Officer

In contravention of the federal guidelines outlined in these decisions in Georgia there is a State Personnel Board made up of five members who have alternating 5 year terms, and who are given an advisory function to suggest methods of improving the State personnel system, conduct hearings, appoint hearing officers and review their decisions. There is also a State Commissioner of Personnel Administration, G.C.A. 45-20-4 (formerly 40-2205, in 1981, [Appendix 15] re petitioner's hearing). This Personnel Commissioner also serves as the Executive Secretary to the Board. He is appointed by the Governor, as are the members of the Board. The Board members are permitted no more than two terms consecutively. The Commissioner serves at the "pleasure of the Governor." (O.C.G.A. 45-20-4). As Executive Secretary, he will nominate the appointment of hearing officers for

approval of the Board. (O.C.G.A. 45-20-3). There is no requirement that the hearing officers be appointed on a rotating basis because there are only two of them, and they have made a consistent living for quite a period of time in these positions. For all intents and purposes, these two positions are permanent as long as they suit the pervasive political climate on Georgia's Capitol Hill. If they provoke ire among the department heads they know that they can be summarily dismissed. Decisions would hardly be rendered by them that might make them unpopular with the state department heads.

The Georgia appointment procedures for Hearing Officers likewise contravene the recommendations given by H. Eliot Kaplan, General Counsel to the National Civil Service League and Adjunct Professor of Public Administration, New York University. In his very authorative work, The Law of Civil Service (Matthew Bender & Co. Inc.,

1958, Library Ref. KF5337 N 38) the author set up a model state civil service law. In this he made it very clear that "the Director of Personnel may be removed by the Civil Service Commission for cause only after he has been presented in writing with reasons for his removal." (ibid. at 372). Also, the Commission members, equivalent to the Georgia Personnel Board, can only be removed for cause. (at 373). This comports with the major merit system principles outlined for the Federal Civil Service, in 5 U.S.C. 1200 and following. The fact that these details are not mandatory on State Civil Service Systems should not mean that the principles of protection contained therein are not principles of due process. The Georgia Board is without continuity or responsibility for administration, but serves a more technical function of approving the commissioner's actions (recommendations?) and collecting $200.00 and expenses for

every meeting. The power is placed in the Governor and his appointed commissioner to recommend the appointment of hearing officers and run the "Merit System". The hearing officers are thus at the mercy of the political community, and this removes them from any semblance of a protective procedure to administer justice between civil service employees and these political department heads. They could hardly be expected to risk a collision with a powerful political King maker. (See Appendix 16). As was said in Johnson v. U.S. Department of Agriculture, 734 F.2d 774 (1984) "we have serious reservations about the neutrality of the hearing officers. The regulations established that the hearing officer is a nearby District Director. On its face, the regulation appears less than neutral. The nearby District Director will be evaluating a decision to foreclose made by a peer and already approved by his boss, the State

Director. . . .At trial the plaintiffs may be able to further demonstrate a conflict of interest in the hearing officers. On the surface the plaintiffs have shown a substantial likelihood that a conflict may exist that would impinge the hearing officer's impartiality." (id at 782-783). A general connection between the Hearing Officer and his employer was discussed at large in Schweiker v. McClure, 456 U.S. 188, 72 L.Ed.2d 1 (1982). An Insurance Carrier Hearing Officer had been appointed to hear certain types of social security cases. An attack was made on their impartiality but the court pointed out that such hearing officers, who had been appointed by the insurance carriers to hear these claims, would possibly have shown a bias, but "generalized assumptions of possible interest, placing special weight on the various connections of the hearing officers with private insurance carriers" should not be made. "The difficulty with

this reasoning is that these connections would be relevant only if the carriers themselves are biased or interested." (id. at 196). The court went on to point out that the carriers only administered the social security claims and the salaries of the hearing officers were paid by the federal government and the benefits which were allowed or denied were social security benefits payable out of the social security fund. Their job was to award or deny benefits in compliance with standards prescribed by the statute and the secretary. Thus, there was no impunging interest on the hearing officers under such cases because his position could not be classified as adversary to one party or the other in the contest which he had to decide. Their appointing authority had nothing to gain or lose. The Georgia Hearing Officers do not enjoy such apparent immunity from pressure.

The requirement for exhaustion for state administrative and legal procedures has recently been summarized in Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); 73 L.Ed.2d 172; 102 S.Ct. 2557. "The very purpose of § 1983 was to interpose the federal courts between the states and the people as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law 'whether that action be executive, legislative, or judicial'" (id. at 503). The court went on to quote the Congressional Globe as identifying the great tribunal "where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact." (id. at 503). "Congress believed that federal courts would be less succeptable to local prejudice and to the existing defects in the factfinding processes of the state courts" (emphasis added) (id at 506).

IV.

First Amendment Rights

"Due process requires that the state bear the burden of proving that the speech was not protected." Board of Regents v. Roth, 408 U.S. 564, dissenting opinion by Douglas, J. at 584, quoting Speiser v. Randall, 357 U.S. 513. There has been no attempt by the state here to show that there was any type of discourtesy involving plaintiff's First Amendment Rights. The District Court seemed to agree that a trial (by jury) is appropriate to discern the truth about reprisal because of free speech, but then argues that petitioner must demonstrate that protected speech was the motivating factor for the act complained of, Quoting from Williams, Schneider, Mt. Healthy School District, and others (Howkins at 106). But the issue was poorly developed because petitioner was denied the right to cross examine on his own and under the rule of "any evidence" he

could hardly prevail against the statements of a convicted felon (Mr. Railey, U.I. Director). The proximity of petitioner's memo (Appendix 1) and his complaint against surreptitious influencing by the staff attorney to his notice that he must step down (two working days) seems adequate to illustrate the real cause. If petitioner can show this to a jury, the burden of proof would likely shift to defendants. The petitioner's memo to his supervisor (and to no one else) suggesting that the Commissioner should take action under the law concerning a matter particularly within my ambit of responsibility. (Appendices 1 & 2).

"The First Amendment insures that under most circumstances even the most junior government clerk typist can criticize the speech and acts of top officials in her office as freely as any citizen can....We have no doubt that the market place of ideas often entails such

costs, but the Supreme Court has made clear that the First Amendment generally eschews this short-sighted view and is more concerned with the long-term gains of robust debate." Porter v. Califano, 592 F.2d 770, at 779 (1979).

VI.

Res Judicata

"As we held in England, abstension doctrine may not serve as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions." Montana v. United States, 440 U.S. 147 at 163 (1979). Again, "Res judicata of administrative decisions does not require the rigid finality of judicial proceedings" Thompson v. Schweiker, 665 F.2d 936 at 941, (9th Cir. 1982).

"These decisions (Arnett & North Georgia Finishing) underscore the truism that due process unlike some legal rules,

is not a technical conception with a fixed content unrelated to time, place and circumstances (cites omitted)." Matthew v. Eldridge, 424 U.S. 319, at 334 (1976). In Kramer v. Chemical Construction Corp., 456 U.S. 461 in n. 5, the court found that appeals court in the 3rd, 7th and 8th circuits had ruled that a federal court may not "attribute preclusive deference to prior state court decisions reviewing state agencies determinations" (Smous, Unger & Gunther) (at 466).

In citing Ray v. TVA, 677 F.2d 818 (11th Cir. 1982), the court again analogized the theory of res judicata where the underlying trial of facts was under the supervision of adequate and proven procedures of a federal commission (civil service). The evidence was "substantial" and not a mere scintilla[6/]. See, Howkins,

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6/ See Georgetown Law Journal, Vol. 54:p. 857 Preclusion/Res Judicata. Due to the "Supreme Court's protection of this right, it would seem that there might be some reluctance to foreclose a jury trial (footnote continued)

p. 103.

Since the rule requires that a state show that they would grant preclusive affect to their own decisions before preclusive affect should be granted by a federal court of that district, the procedures used in Sarah Coventry v. Caldwell, 243 Ga. 429, 254 S.E.2d 375 (1979) is appropriate for consideration here. The court made two points of interest. "Although there were determinations made at two levels beneath the superior court (first by the Employment Security Agency of the Georgia Department of Labor, and then by the Director of the Unemployment Division of the Georgia Department of Labor, following an evidentiary hearing), the Superior Court was the first impartial tribunal in the proceedings. The first two adjudications were made by an agency of the executive

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(footnote continued from previous page)
of a fact issue because of
administrative determination" at p. 874.

branch of government, with an interest in broadening the base of revenues for the unemployment security tax. Accordingly if there is any competent evidence to support the Superior Court's conclusions of law, even if based upon an erroneous conception of the applicable standard...we will uphold that court's judgment," 254 S.E.2d at 378. The Supreme Court of Georgia has thus recognized a prejudice in administrative determinations where the decision maker was possibly connected in some way with a desire to see a particular outcome, and also found that there was no preclusive effect that should be granted to that administrative decision. In the proceedings below at no time did the state advocate for preclusive effect of a hearing officers decision by the Merit System Hearing Officer in any of its own courts. Upon review by district court of an appeal concerning a discharge (prior to Patsy, supra), it was incumbent upon the district

court to review the agencies procedures and see "Whether its factual determinations were supported by substantial evidence and whether its action was arbitrary, capricious, or an abuse of discretion and decision of the district court was to be given no particular defference." Francisco v. Campbell, 625 F.2d 266 (1980). This court therefore placed in a nutshell the distilled doctrine that the failure of a procedure below cannot be cured by overlayering it with various court decisions. There is now full recognition of the constitutional mandate as outlined in Patsy. That the "great tribunal" is not to be manipulated by various window dressing procedures that give the appearance of fairness and justice, when in fact the underlying decision was marked by capriciousness and conceptual deficiencies in their procedures.

Petitioner requests that the Supreme Court of the United States overturn the

decisions denying him access to a federal jury in the District Court of North Georgia for a determination on the merits of his protest against being downgraded, and other relief as appropriate.

Petitioner also asks the Court to award a reasonable fee in the amount of $9,000.00 and the cost of this action.

APPENDIX 1

State of Georgia

Department of Labor

Employment Security Agency

Atlanta, Georgia

Memorandum

To: MR. J. FREEMAN RAILEY, DIRECTOR
UNEMPLOYMENT INSURANCE DIVISION

From: JOHN H. HOWKINS
CHIEF ADMINISTRATOR HEARING
OFFICER

Date: DECEMBER 1, 1980

Subject: REQUEST FOR JUDICIAL REVIEW -
FLOYD S. PIKE COMPANY

The Board of Review has recently rendered a decision (Leonard C. Teal Board Decision Number 944-80) in which the hearing officer was overturned for reasons that we consider inappropriate. The matter concerns the right of an employer to transfer a claimant any number of miles from his previous work

site and still consider such transfer as being an inmaterial change in the working conditions. The Board evidently puts great emphasis on a contract of hire agreement in which the claimant agrees to transfer anywhere under any conditions as long as work is available in his job classification. This states in part, "This new location may be in the same state or any other state where work is available."

We have long considered that this addition by Floyd S. Pike, Electrical Contractors in an unreasonable requirement as a work rule, and invalid as a contractual provision. My experience in the Courts of Georgia have indicated that such contractual provision is against public policy because it is similar to other contractual provisions that have been voided by the courts as restriction on employment. Under the technical rules of contract law such a

provision is not enforceable because there is no consideration given to the man who has to make this move. The man who has to move thirty or forty miles is paid nothing, and the man who has to move three or four hundred miles is likewise paid nothing. The employer is then in a position to demand that an employee move several hundred miles from his base station and pay not one penny to the transportation cost or the daily maintenance. It is this factor, lack of any payment scaled to the cost imposed on the claimant to make the move, that makes the contract provision unenforceable.

The history of dealing with this employer reveals that the contract provision was only added after experience with hearing officers indicated to them that unemployment charges would continue to run high if they didn't have such a provision. The net effect of the provision is to reduce their unemployment

tax rate rather than to force workers to transfer to other states. It seems obvious that the company is trying to use the clout of the Unemployment Insurance Division to force workers to transfer from their home commuting area and stay with the company even though the claimants themselves would have to foot the cost of making the transfer; in the alternative, the claimant is expected to give up unemployment benefits.

In brief summary the six reasons why we should not permit this contract clause to operate as a denial of benefits are:

1. The provision is not valid at law as an enforceable item of a contract for employment.

2. Since it is unenforceable, the company cannot sue someone for refusing to make the transfer.

3. Since the company can get no benefit by forcing an employee to make a transfer, the only benefit they can get

out of it is to cut off unemployment insurance benefits.

4. The point made in the above paragraphs is the real reason for incorporating the provisions in the hiring contract and as such is accomplishing by indirection what is specifically prohibited by Section 15(a) of the Employment Security Law. Thus, in effect, the claimant is signing a waiver of right to unemployment benefits if he refuses to move four or five hundred miles at his own expense.

5. The contract provision only works to the convenience of the company, but works to the detriment of claimants who are in the areas where construction is not of continuing prospect to the company. In effect, the company is trying to reduce cost of outlying operations by denying benefits to claimants in those areas where they do not have continuing contracts.

6. This provision in the contract is similar to the "yellow-dog" contract of the early 1900's. Workers had to sign away their rights to join a union in order to get on the employer's payroll. In this case they are signing away their rights to unemployment insurance benefits in order to get on the payroll. In this particular case, the claimant worked approximately ninety days for this employer and finished the work that the employer had in Cumming, Georgia, but the employer now contends that the claimant did not live up to his working contract because he refused to move to Cordele, Georgia and continue with the company at no expense to the company for making such a transfer. It seems to be against the good conscience of the Employment Security Law as outlined in Section 2 thereof, to deny legal benefits on such a filmsily constructed contractual arrangement as this.

In view of the above I recommend that the Commissioner appeal this Board of Review decision to the Court. I do not believe that the Court will have any trouble seeing that the purpose of this contractual provision is not to provide workers for the company, but to deny unemployment benefits to claimants who have been laid off due to lack of work. A court could hardly impute fault to a claimant merely because he objected to pay such large moving costs out of his own pocket as the employer seems to require. The uneven bargaining position of the two parties to this contract has long been considered as a material item in these "social" and "labor relations" types of contracts.

JHH/faw

Attachment - 2

(Georgia Code Section known to Mr. Railey)

[34-8-5] (Formerly 54-65) Waiver of rights void

Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this Chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, or payments in lieu of contributions, required under this Chapter from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions or payments in lieu of contributions, required from him, or require or accept any waiver or any right hereunder by any individual in his employ. (Acts 1937, pp. 806, 837; 1973 pp. 729, 742.)

APPENDIX 2

U.S. Department of Labor

Employment and Training Administration

601 D Street, N.W.

Washington, D.C. 20213

Reply to the Attention of:

January 11, 1982

John H. Howkins, Esquire

2954 Rockingham Drive, N.W.

Atlanta, Georgia 30327

Dear Mr. Howkins:

This is in response to your letter dated November 25, 1981. You requested my opinion as to whether or not a particular memorandum that you wrote to the Director, Unemployment Insurance Division was within the scope of your job responsibilities as Chief Administrative Hearing Officer. The memorandum in question was addressed to Mr. J. Freeman Railey, Director, Unemployment Insurance Division, from John H. Howkins, Chief Administrative Hearing Officer, dated

December 1, 1980, subject:--Request for Judicial Review--Floyd S. Pike Company. It contains your analysis of a Board decision, referred to in the memorandum as the Leonard C. Teal Board Decision Number 944-80. The memorandum expresses your disagreement with the interpretation of law in that decision, your reasons for this, and your recommendation that the Commissioner appeal the Board's decision to Court.

In my opinion, this was not only within the scope of your job responsibility, but it was your duty to express your views on the subject to the Director who is your immediate supervisor. As the Chief Administrative Hearing Officer, the interpretation of statutory provisions on benefit claim issues is within your particular area of expertise. Your obligation to notify the Director of your disagreement is even greater if it is the policy in Georgia to

accept Board decisions as "precedent" unless and until they are subsequently reversed or modified by a court.

There must be one qualification to my answer, but I doubt that the qualification will apply. My answer above is based on the presumption that you were not previously instructed by your superiors to refrain from writing the memorandum. If the memorandum was written in violation of instructions from your superiors not to do so, I am constrained to state that I would consider your action to be improper under those particular circumstances. As I stated, the possibility that this happened seems to me to be extremely remote, but I felt that I should mention it anyway.

I would normally send a letter like this through the clearance process of the Employment and Training Administration. However, you asked that the letter be

notarized which would make it rather awkward to send through our clearance. Therefore, I am presenting it as my personal opinion, and since it has not been "cleared" it does not have the official sanction of the Unemployment Insurance Service. I would add, however, that I am certain that my comments in this letter are consistent with the official view of the Unemployment Insurance Service. If you need to know my qualifications for formulating the opinions expressed in this letter, let me know.

In accordance with our protocol, I sent a copy of this letter to our Atlanta Regional Office.

Sincerely,

BERNARD STREETT
Appeals Program Supervisor
for the Unemployment Insurance
Service
/S/Bernard Streett 1-11-82
/S/Mildred Y. Rosen 1-11-82
(Notary)

(Entered for Record in District Court Docket Book 5710 Page 474)

APPENDIX 3

State of Georgia

Department of Labor

Employment Security Agency

Atlanta 30334

Unemployment Insurance Service

Claims Administration

December 30, 1980

M E M O R A N D U M

TO: All Appeals Personnel
All Admin. Hearing Officers

FROM: J. Freeman Railey, Director
Unemployment Insurance Service

Effective 8:00 a.m., January 5, 1981, Mr. Ed Fulford is being assigned full responsibility for personnel and operations of lower authority appeals in the Georgia Department of Labor. Mr. Fulford has full authority in matters of personnel and operations in the Appeals Section.

JFR:ls

cc: Commissioner Caldwell

The Board of Review

Mr. Walter O. Brooks

Mr. Sam McCutchen

Mr. Ken Drucker

Ms. Evelyn Garner

APPENDIX 4

(Excerpts from newspaper articles.)

The Atlanta Constitution, page 1-A, Tuesday, December 6, 1983.

Labor payroll includes kin of 2 officials

Continued on page 8-A under heading, Labor)

.... Morris, whose board is the governing body for the State Merit System, responsible for hiring employees, denied that there was any conflict of interest in the state employment of his two sons and a daughter-in-law.

One of Morris' sons, Francis "Chip" Morris, ... was an indicted co-conspirator in an indictment earlier this year ....

.... the younger Morris was accused of erecting political campaign signs, loading political signs and transporting "soup, tomato juice and potatoes" to Coarsey's residence during Caldwell's re-election campaign in the summer of 1982. ....

APPENDIX 5

(Excerpts from newspaper articles.)

The Atlanta Journal, Wednesday, June 29, 1983.

Labor official sentenced to prison

By Greg McDonald - Staff Writer

A high-ranking state Labor Department official was sentenced Tuesday to four years in prison for forcing employees, under threat of losing their jobs, to contribute money to Labor Commissioner Sam Caldwell's 1982 campaign.

The official, Austin P. Coarsey, had pleaded guilty earlier this month to four of 13 federal counts of extortion in his solicitation of contributions in the Tifton and Fitzgerald offices....

The Atlanta Constitution, page 1, Tuesday, May 1, 1984.

Harris gives Caldwell 2 options: Resign post or face impeachment

"It's down to two options," Harris said. "If he doesn't resign it's imminent that we start impeachment proceedings. ....After what happened this week with him threatening to fire employees who testified against him and me having to get an injunction against him to stop that, there's really no other choice."....

The Atlanta Journal, Wednesday, June 29, 1983 (continued).

Continued on page 4-A under Caldwell.

Besides Caldwell, 12 officials have been convicted in the course of the two-year probe of the Labor Department, and six of them are still drawing salaries while pursuing their appeals.

Also on the state payroll are five employees who have been indicted and are awaiting trial. And another nine officials were indicted on state racketeering charges that were dismissed in Fulton County Superior Court, but the attorney general's office nas appealed the dismissal....

APPENDIX 6

(Excerpts from Dec. 1984 Memo by Robert S. Stubbs, Assistant United States Attorney)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	*	By:
	*	CRIMINAL
	*	INDICTMENT
v.	*	
	*	NO. 84-32A
S. SAM CALDWELL, et al	*	
	*	
	*	

SENTENCING MEMORANDUM RE SAM CALDWELL

1. Introduction

S. Sam Caldwell was convicted on six counts of mail fraud, one count of destruction of a vessel to collect

insurance proceeds and one count of conspiring to destroy a vessel to collect insurance proceeds. The jury returned its verdict on November 17, 1984, after only six hours of deliberation. The eight counts upon which defendant Caldwell was tried were part of a nineteen count indictment returned by a federal grand jury on February 6, 1984. Of those nineteen counts, defendant Caldwell was charged in twelve. The Court has heard a small portion of the evidence on two of those counts, in the James Hearing. While those two counts are on appeal, the other two counts are awaiting trial and include, as part of their charges, the mail fraud counts upon which defendant Caldwell has not been convicted and the two counts on appeal.

4. The Boat Case

The United States submits that, although the case upon which defendant, Caldwell has been tried and convicted was

not the basis for the Labor investigation nor the predominant reason defendant Caldwell was forced to resign as Commissioner of Labor, it was a serious offense which reflects adversely upon defendant Caldwell individually and as a former powerful public official for the State of Georgia for almost two decades. The fact that the insurance company did not pay defendant Caldwell's claim (through Shanks) is insignificant. There is every reason to believe that had it not been for the investigation of Labor, including defendant Caldwell and Bill Shanks, the insurance company eventually would have paid the claim of $95,000. This conclusion is justified because of the similar circumstances of the sinking of the MY WAY in 1978, where the $30,000 claim was paid, even though the insurance company believed the sinking was highly suspicious. Exhibit A....

5. Caldwell's Background

In 1966 defendant Caldwell ran for Commissioner of Labor against Ben T. Huiet, who had been the Commissioner of Labor since Labor was established in 1937. Defendant Caldwell successfully campaigned as a reform candidate, attacking Huiet for such things as "using state employees in his campaign" and "solicit[ing] (funds) from his employees". Exhibit B....

Despite defendant Caldwell's election stance and later directives to employees within his department, Exhibit C, defendant Caldwell came under investigation by both the Georgia Attorney General's Office and the United States Attorney's Office as a result of certain allegations growing out of his reelection campaign in 1970. Those allegations centered on defendant Caldwell's alleged solicitations of campaign contributions from his

employees. Although defendant Caldwell admitted accepting campaign contributions from employees, he testified that he saw nothing wrong with accepting such contributions....

The termination of that investigation in 1974 coincided with the beginning of another reelection campaign by defendant Caldwell. Despite just weathering a two year investigation involving campaign contributions from his employees, defendant Caldwell continued to allow or encourage such practices to continue....

6. (a) Bribery

Tommy Marchant and William Durham were interested in a Field Supervisor and Office Manager position, respectively, at about the same time defendant Caldwell paid off his tax debt. Both approached Austin Coarsey about the positions and were told essentially that a monetary gift to defendant Caldwell to help him

with his tax debt would in all likelihood assure them the positions they sought. Both took out loans to accomplish the bribes to Caldwell; and both paid Caldwell directly. Both received their positions shortly thereafter--Durham the very night that he paid Caldwell the bribe....

6. (c) Extortion for Contributions to 1978 Caldwell Re-election Campaign

The 1978 re-election campaign for defendant Caldwell was unique in that it was his first use of Appreciation Receptions as fund raisers. Ten dollar tickets were sold as admission to these receptions with proceeds going to defendant Caldwell's campaign. Defendant Caldwell originated the idea, at least according to Austin Coarsey, who testified he was very active in promoting the reception in his area of Albany....

In 1978 Labor employees again were solicited for contributions to defendant

Caldwell's campaign. These contributions were primarily in cash so they would not be traceable....

6. (d) Extortion for Contributions to 1982 Caldwell Re-election Campaign

In 1982 defendant Caldwell again decided to use the concept of Appreciation Receptions as fund raisers. Also he decided to make sure all of them were held prior to the date for any opponents to qualify. He also deliniated responsibilities for those receptions in 1982. Testimony of Luther Stiles at James Hearing, October 2, 1984. Of course defendant Caldwell denied responsibility for the origin of these receptions or for directing who would do what when he testified in front of the Commission on October 28, 1982....

7. Argument and Recommendation of Sentence

As a result of the facts uncovered by this investigation it is apparent that

the source of defendant Caldwell's power for all these years was his political organization which was founded upon a power base made up of his employees. It was their money and their grass roots political activity, all illegally obtained, that made defendant Caldwell a power to be courted and feared. With a simple gesture defendant Caldwell could raise thousands of dollars for various political campaigns, cause political signs to sprout all over Georgia and make any Georgia political barbecue a rousing success with large numbers of sympathetic voters in attendance who also happened to be Labor employees....

The Court should consider defendant Caldwell's own attitude toward propriety and the rule of law as represented by his own statements to one of his employees who complained about having to work on defendant Caldwell's boat on state time because it was causing other workers to

complain about their increased workload:

"Q. What did the Commissioner say to you when you said they were going to complain?

A. He said, who are they going to complain to, the Lord? He says, we have just beat a federal grand jury investigation.

Bill Shanks said, if they complain too loud, they can be eliminated."

APPENDIX 7

Exercpt from

Felony Sentence

Charge: Conspiracy to Defraud the State
Violation of Oath of Office
Fulton Superior Court
March - April Term, 1984

No. A-68603

The STATE ((Verdict) of
vs. (Guilty
S. Sam Caldwell (as to Count 1

Whereupon, It is ordered and adjudged by the Court that the Defendant, S. Sam Caldwell be taken from the Bar of this Court to the Jail of Fulton County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or to such other place as the Director of Corrections may direct, where he, the said defendant be confined at labor for the full term of

Five (5) years to be computed according to the law, To serve one (1) year Balance of Sentence Probated on Payment of Fine of $10,000.00 and the Order of Probation, if any, is incorporated Herein by Reference, ...

(By the Court, April 25, 1984)

(Excerpt from The Atlanta Constitution, Wednesday, December 28, 1983, page 1)

Caldwell, 15 officials at Labor indicted on racketeering count

By Hal Straus
Staff Writer

Georgia Labor Commissioner Sam Caldwell and 15 top officials in his department were charged Tuesday with racketeering and extortion as part of a concerted effort to keep Caldwell in power.

Already indicted on charges of defrauding the state, Caldwell called the new indictments politically motivated and said if he was guilty of anything, Gov. Joe Frank Harris was just as guilty....

APPENDIX 8

Section 6d - Employment Security Law of Georgia (1980)

OCGA 34-8-172(a)(c) [formerly 54-614(d)] Appeal Tribunals. - To hear and decide appealed claims, the [Board of Review] (in April 1981 charged to Commissioner) shall appoint one or more impartial Appeal Tribunals. Each such Tribunal shall consist of either a referee selected in accordance with Section 11(d) of this Act or a body consisting of three membrs, one of whom shall be a referee, who shall serve as chairman, one of whom shall be a representative of employers, and the other of whom shall of whom shall be a representative of employees: each of the latter two members may be selected without regard to Section 11(d) of this Act, shall serve at the pleasure of the Board of Review and be paid a fee of not

more than $10.00 per day of active service on such Tribunal, plus necessary expenses. No person shall participate on behalf of the Commissioner or the Board of Review in any case in which he is an interested party. The Board of Review may designate alternates to serve in the absence or disqualification of any member of an Appeal Tribunal. The Chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the Chairman of the Appeal Tribunal is present. The Commissioner shall provide the Board of Review and such Appeal Tribunals with proper facilities and assistants for the execution of their functions.

Section 11(d) Employment Security Law of Georgia (1980)

OCGA 34-8-74(a) [formerly 54-634(d)(1)]

Personnel. - Subject to other provisions

of this Act, the Commissioner is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of his duties under this Act. The Commissioner may delegate to any such person such power and authority as he deems reasonable and proper, for the effective administration of this Act, and may, in his discretion, bond any persons handling money or signing checks hereunder. (The following sentences were removed by law revision in 1982) The Commissioner shall classify positions under this Act and shall establish salary schedules and minimum personnel standards for the positions so classified. He shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and, except for

temporary appointments of not to exceed six months in duration, such personnel shall be appointed on the basis of efficiency and fitness as determined in such examinations. No person who is an officer or committee member of any political party organization or who holds or who is a candidate for any elective public office shall be appointed or employed under this Act. The Commissioner shall establish and enforce fair and reasonable regulations for appointments, promotions, and demotions based upon ratings of efficiency and fitness and for terminations for cause. (End of law revisions.)

OCGA 34-8-74(b) [formerly (d)(2)] - The Commissioner is further expressly authorized upon request of any employee of the Agency to deduct from the payroll of such employee any sum due by him for retirement or pension fund, group

insurance, and for government bonds as may be requested by the employee.

APPENDIX 9

Georgia Department of Labor

Employment Security Agency

An Equal Opportunity Employer

Atlanta

Sam Caldwell
Commissioner

Walter O. Brooks
Director
Employment
Security Agency

April 28, 1981

Mr. Reese E. Theus
Hearing Officer
State Merit System
244 Washington Street, S. W.
Atlanta, Georgia 30334

Dear Mr. Theus:

The "Offer of Proof" presented by my employer (letter of April 24, 1981) shows no prior warning or discussion of any complaints. The only reason given me for the downgrade, as of the date it was decided on, was that the right to promote a person carried with it the right to demote that person and it should not be questioned. When I asked why it was

being done, I was told that no reason was necessary.

The record shows that the Director of the Unemployment Insurance Division wants to have all Hearing Officers' decisions conform to his ideas. He has tried to influence decisions even when the Law was clearly against him. My opposition to perverting "due process" has caused this rift.

There is no foundation for admission of any of the testimony offered. Please reject it all.

Very truly yours,

/S/John H. Howkins

cc: John C. Jones
Asst. Atty. Gen.

APPENDIX 10

STATE PERSONNEL BOARD

FOR THE STATE OF GEORGIA

JOHN H. HOWKINS Administrative Hearing Officer IV Appellant	*	Before the State Personnel Board
versus	*	DEMOTION Type of Appeal
GEORGIA DEPARTMENT OF LABOR Appointing Authority	*	Appeal No. 81-124

I N I T I A L D E C I S I O N

I. INTRODUCTION

The appellant, Mr. John H. Howkins, was appointed on April 9, 1970, as Appeals Referee Ii with the Georgia Department of Labor at grade 18/2. On August 1, 1974, he was changed to grade 20/6 as Appeals Referee II. Mr. Howkins was promoted to the position of Chief Appeals Referee, grade 21/7 on July 1, 1977 and was changed to Administrative Hearing Officer IV, grade 39/5 as a result of the Classification Survey Implementation on July 1, 1978. On July 1, 1979, Mr. Howkins received a salary

increase to Administrative Hearing Officer IV, grade 39/6 and again received a salary increase on July 1, 1980, to Administrative Hearing Officer IV, grade 39/7.

The performance ratings on record for Mr. Howkins are:

7/1/79 to 6/30/80	7	Very Good
7/1/78 to 6/30/79	7	Very Good
5/1/77 to 4/30/78	8	Very Good
7/1/77 to 12/31/77	7	Very Good
11/1/75 to 10/31/76	9	Excellent
11/1/74 to 10/31/75	8	Very Good
11/1/73 to 10/31/74	7	Very Good
11/1/72 to 10/31/73	7	Very Good
11/1/71 to 10/31/72	7	Very Good
11/1/70 to 10/31/71	6	Good
4/9/70 to 10/8/70	6	Good

On February 20, 1981, Mr. Howkins was notified of the Department of Labor's proposal to demote him from Administrative Hearing Officer, grade 39, to Administrative Hearing Officer, paygrade 36 as provided under Rule 10.302 and Rule 15. In the letter of proposed demotion, Mr. Howkins was provided the specific charges, proposed effective date and information on

his right to respond to an official with authority to countermand the action proposed.

Mr. Howkins did respond within the time provided and the responding official, after considering Mr. Howkins' response made the final decision to uphold the proposed action to demote Mr. Howkins from Administrative Hearing Officer, grade 39 to Administrative Hearing Officer III, paygrade 36. The Responding Official and Appointing Authority notified Mr. Howkins of the final decision to demote him from the position of Administrative Hearing Officer IV, paygrade 39 to Administrative Hearing Officer III, paygrade 39, effective March 9, 1981. The final notice of demotion contained the specific charges, the effective date and information on the appellants right to refute the charges to the State Personnel Board.

The appellant appealed the demotion action to the Board by letter dated March 19, 1981. A hearing of the appeal was scheduled for April 30, 1981, in the Conference Room of the Department of Labor, 254 Washington Street, S.W., Atlanta, Georgia. The hearing was held as scheduled before Reese Theus, Hearing Officer. The appellant was represented by Mr. L.S. Cobb,k Attorney at Law and the Department was represented by Mr. John Jones, Assistant Attorney General.

Ms. Charlotte Hunt, of the firm Brandenburg and Hasty, served as court reporter.

II. SPECIFIC CHARGES AND FINDINGS OF FACT

Charges made by the appointing authority:

Demotion from Administrative Hearing Officer IV, paygrade 39 to Administrative Hearing Officer III, paygrade 36, to become effective at the close of business March 9,m 1981. This action is being taken pursuant to Rule 15 of the Rules and Regulations of the State Personnel Board, due to your negligence or inefficiency in performing assigned duties; inability or unfitness to perform assigned duties; and misconduct.

The specific reasons for the final adverse action are:

(1) Your inability to perform assigned duties in that on December 1, 1980, you challenged a decision of the Board of Review. As you are aware, the Board of Review is, by law, the highest administrative review body within the Employment Security Agency of the Georgia Department of Labor.

(2) Inability to supervise employees of your section. On several occasions high level Hearing Officers have threatened to resign due to your lack of leadership. Your moment-to-moment or day-to-day changing of instructions to Hearing Officers has led to frustration among the employees of the Appeals Section to the point that there have been physical and emotional problems with employees.

Findings of Fact:

1. I find that the appellant, Mr. John H. Howkins, is employed under the State Merit System, with the Department of Labor as an Administrative Hearing Officer; that he has permanent status; that he had an adverse action taken against him by the

Department of Labor as provided uinder Rule 10.302 and Rule 15; that Mr. Howkins appealed that action in a timely manner, as provided under Rule 14.207; and as such, is proper before the Board in connection with this appeal.

2. I find that Mr. Howkins occupied a supervisory position as Administrative Hearing Officer, supervising both hearing officers and clerical employees; that employees working for Mr. Howkins had problems in understanding instructions coming from Mr. Howkins; that employees working for Mr. Howkins received instructions from Mr. Howkins to do something one way one day and would have the instructions changed the next day; that this action by Mr. Howkins created attitude problems among the employees; that one hearing officer (Charles Herrin) asked to be assigned to "out station" work because he could not get his work done with Mr. Howkins constantly talking to the hearing officer. (Testimony

Mr. Freeman Railey - pp. 91-94; Charles Herrin - pp. 150-152, 152-197; Ed Fulford - pp. 355-357; Pam Kearney - pp. 216-228; Betty Sanders - pp. 235-291; Margaret Kohn - pp. 317-353; Harold Herrin - p. 373).

3. I find that Mr. Howkins, while in a supervisory position was at times indecisive, argumentative towards others, generally Mr. Howkins seemed to have opinions that differed from other staff members, many of whom had 20 or more years of service; that the indecisiveness, and argumentative behavior created management problems for his superiors in that other responsible individuals expressed difficulty in talking with and dealing with Mr. Howkins. (Testimony Mr. Railey - pp. 93-94; 107-108; Betty Sanders, - pp. 233-291).

4. I find that Mr. Howkins, as manager of the hearing officers, was required to send the Hearing Officer decisions to Archives; that Mr. Howkins had

been instructed to send cases to Archives; that at the time Mr. Fulford came on board as Chief Hearing Officer, when Mr. Howkins left that position, there were 248 cases over 75 days old; that 666 cases were on hand that had been dictated by hearing officers that had not been typed; that this work load was excessive since Mr. Howkins had delayed sending decisions to Archives. Mr. Fulford sent the files to Archives as ordered by the Federal Court Order within a matter of a few weeks. (Testimony Mr. Ed Fulford - pp. 353-358; Mr. Freeman Railey - pp. 90-95).

5. I find that the Board of Review is a precedent setting body and that fact had been so stated in writing by the Commissioner in December, 1980; that the full Board met in November of 1980 to complain to the Commissioner that Mr. Howkins had approached the Board prior to that day and the Board expressed to the Commissioner that he (Howkins) was quite

abrasive with them concerning their decision in the "Pike decision"; that Mr. Howkins was quite upset about the Pike decision; that such act by Mr. Howkins was an act of challenging the decision of the Board; that Mr. Howkins went further and attempted to get the Commissioner to appeal the Board's decision (testimony Mr. Railey - pp. 102-107); that Mr. Howkins informed one of his hearing officers (Charles Herrin) that "we don't have to worry about the Board of Review" (testimony Charles Herrin - pp. 182-184; Xerona C. Brady - pp. 294-317); that Mr. Howkins stated to an administrative hearing officer (Kathryn Moody) that his decision was correct; that the Board was in error. (Testimony Ms. Moody - pp. 380-382).

III. CONCLUSIONS OF LAW AND REASONS FOR INITIAL DECISION

A preponderance of the evidence herein shows that the appellant, Mr. John H. Howkins, was in fact negligent and inefficient in the performance of his

assigned duties by failing to properly supervise his employees on several occasions that caused employees to be frustrated and confused resulting in at least one employee wanting to be moved out of the immediate supervision of Mr. Howkins; that the evidence further shows that Mr. Howkins committed an act of misconduct in the performance of his assigned duties by challenging the decision of the Board of Review, the highest Administrative Review body within the Employment Security Agency of the Georgia Department of Labor. Either act of misconduct, negligence of inefficiency by Mr. Howkins is an act sufficient for the Department of Labor to take action to demote Mr. Howkins from the position of Administrative Hearing Officer, grade 39 to AdministrativeHearing Officer, grade 36 as provided under Rule 10.302 and Rule 15.

IV. INITIAL DECISION

In view of the above findings of fact, it is my initial decision that the appeal of Mr. John H. Howkins is hereby denied and that the adverse action taken by the Department of Labor in demoting Mr. Howkins for cause from Administrative Hearing Officer, grade 39 to Administrative Hearing Officer, grade 36, is upheld as provided under Rule 10.302 and Rule 15.

In the absence of an application for review to the State Personnel Board from the adversely affected party, within 30 days from the date this initial decision is issued, or an order by the Board within such time for review on its motion, this decision shall, without further proceedings or notice become the decision of the Board and any right of additional appeal shall be estinguished. No additional evidence is to be submitted to the Board other than the information that was made a part of the

record of the appeal. The application for review may be accompanied by rebuttal of the information in the record.

Initial decision made this 12th day of June, 1981.

/s/

Reese E. Theus
Hearing Officer

APPENDIX 11

State Personnel Board

Leonard Morris, Chairman
Isabel G. Webster, Vice-Chairman
Charles E. Storm, Executive Secretary
Susan A. Cahoon, Member
O. L. Kelehear, Jr. Member
Frank O. Downing, Member

July 22, 1981

Mr. John H. Howkins
Department of Labor
254 Washington Street, S.W.
Atlanta, Georgia 30334

Dear Mr. Howkins:

The State Personnel Board at its regular monthly meeting held on July 22, 1981, considered your application for review in the matter of John H. Howkins versus the Department of Labor.

For your information, the Board's decision is attached.

Sincerely,

/S/Charles E. Storm
Executive Secretary

CES:vm
cc: John C. Jones
Farris Freeman

Attachment

STATE PERSONNEL BOARD

John H. Howkins
Appellant

versus

Department of Labor
Appointing Authority

81-124
Appeal Number

Board Review Number

June 12, 1981
Date of Initial Decision of Hearing Officer

7/22/81
Date of Board's Final Decision

D E C I S I O N

The State Personnel Board has received a request to review the initial decision of the Board's Hearing Officer. The certified record of the hearing has been provided the Board.

A thorough review of the record and the Initial Decision of the Hearing Officer has been conducted by this Board. The Hearing Officer's findings of fact, conclusions of law, the reasons for the Initial Decision, and the Initial Decision have also been reviewed and the

Hearing Officer's findings of fact and conclusions of law are hereby adopted as the finding of fact and conclusions of law of this Board.

Based on these facts, it is the Board's decision, effective this date, that the appeal is hereby denied.

Decision made this 22nd day of July, 1981.

/S/Leonard Morris
Chairman

Isabel G. Webster
Vice Chairman

Susan A. Cahoon
Member

/S/O. L. Kelehear
Member

/S/Frank O. Downing
Member

APPENDIX 12

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN H. HOWKINS	)	CIVIL ACTION
ADMINISTRATIVE	)	
HEARING OFFICER IV,	)	FILE NO. C-77783
Plaintiff	)	
vs.	)	
GEORGIA DEPARTMENT	)	
OF LABOR,	)	
Defendant	)	

O R D E R

This is an appeal from a decision of the State Personnel Board, upholding a downgrade of the petitioner's position with the Georgia Department of Labor, from Administrative Hearing Officer IV (Grade 39) to Administrative Hearing Officer III (Grade 36). Upon full consideration of the entire record, this Court hereby AFFIRMS.

1. The record, which includes extensive testimony by the petitioner,

his superiors and subordinates, and his co-workers, does contain evidence which would suport the findings of the Board. The Initial Decision affirmatively shows that all available evidence, including favorable performance ratings, were considered, and that findings of fact and conclusions of law were duly made based upon the totality of the evidence.

"The court shall not substitute its judgment for that of the board as to weight of the evidence on questions of fact." Ga. Code Ann. §40-2207.1(m). Where there is "any evidence" to support the findings of the Board, they must be affirmed. Hall v. Ault, 240 Ga. 585 (1978).

2. While the petitioner raises claims of bias and prejudice, they were not raised at the administrative level, and may not be considered here. Georgia Real Estate Comm'n v Burnette, 243 Ga. 516 (1979).

3. No error is shown in the admission or exclusion of testimony subject to the hearsay rule at the hearing. On one occasion, hearsay testimony by the petitioner was properly execluded, as no exception allowing admission was urged by petitioner's counsel (Tr. 442, lines 7-14). At another point (contrary to the petitioner's assertions in his Petition for Review), hearsay testimony by the petitioner was ultimately admitted for the purpose of showing course of conduct (Tr. 393, line 11-tr. 395, line 12). Similarly, hearsay testimony as to statements allegedly made by the petitioner were at one point admitted as an admission against interest (Tr. 329, ones 8-20). No error was shown in any of the rulings.f

4. No showing is made that the petition was denied an asserted right to self-representation. The petitioner was

represented by counsel at the hearing, and at no time communicated a desire to act as his own counsel. Under the circumstances, it was proper for the hearing officer to control the proceedings by restraining the petitioner from inappropriate colloquy with witnesses.

5. Any and all constitutional claims having been waived by the petitioner in open court upon hearing of this appeal, the same are not considered here.

For the above reasons, the decision of the State Personnel Board is hereby AFFIRMED.

Let it be so ORDERED

This 2nd day of MARCH, 1982.

/S/JOEL J. FRYER

JUDGE, FULTON SUPERIOR COURT,

A. J.C.

APPENDIX 13

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-8452

Non-Argument Calendar

D.C. Docket No. 82-2308

JOHN H. HOWKINS,

Plaintiff-Appellant,

versus

SAM S. CALDWELL, et al.

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

(November 27, 1984)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

APPENDIX 14

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8452

JOHN H. HOWKINS,

Plaintiff-Appellant,

versus

SAM S. CALDWELL, et al.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Northern District of Georgia

ON PETITION FOR REHEARING

(January 4, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT

/s/ Johnson
United States Circuit Judge

APPENDIX 15

OCGA 45-20-3. Duties and functions of State Personnel Board generally.

(a) The State Personnel Board shall prescribe the general policies by which the state merit system shall be administered.

(b) It shall be the specific duty and function of the State Personnel Board:

(4) Where the board deems a review appropriate, to ensure that a review is afforded on dismisslas, other adverse personnel actions defined by the rules and regulations of the State Personnel Board, and other purported violations of the rules and regulations in the several departments which are included in the civil service as well as in other matters under the board's jurisdiction with the provision thath the State Personnel Board is authorized to appoint a hearing officer for the purpose of holding hearings, compiling evidence, issuing initial decisions, submitting evidence to the State Personnel Board for its determination, or for making investigations on behalf of the board relating to personnel matters. All appeals determinations of the board shall be written and documented as to findings of fact, basis for decisions, and prescribed remedies;

OCGA 45-20-4. Creation of commissioner of personnel administration; appointment; compensation; powers and duties generally; appointment, etc. of deputy commissioner, etc.

(a) There is created the position of commissioner of personnel administration. The commissioner shall be appointed by the Governor after consultation with the State Personnel Board subject to confirmation by the Senate. The Governor shall fix the compensation of the commissioner, who shall serve at the pleasure of the Governor.

(b) The duties and responsibilities of the commissioner shall be:

(1) To serve as executive secretary to the board, to attend meetings as directed by the board, and to provide such professional, technical, and other supportive assistance as may be required by the board in the performance of its duties;

(2) Consistent with board policy, to administer the operations of the state merit system and to otherwise act in the capacity of chief executive officer of the state personnel administration program;

APPENDIX 16

(Excerpts from newspaper articles.)

The Atlanta Constitution, page 12-A, Friday, August 5, 1977.

Labor Commissioner Is Feared Man in Politics

.... "If I was running for statewide office," said Senate President Pro Tem Al Holloway, a former foe of Caldwell, "I suspect I would like to have his support as much as anybody else in Georgia."

* * *

The 49-year-old labor commissioner is a feared man in Georgia politics.

In interviews, several state officials asked to go off the record before making critical comments about him.

One official described Caldwell's Department of Labor (DOL) as a throwback to the Georgia politics of 30 years ago, the era of county-unit voting and a spoils system based on patronage. ....

The Atlanta Constitution, Friday, December 9, 1983, page 1-A.

State officials fetch top-dollar salaries

.... Georgia's labor commissioner earns $57,823 annually, tops in the country. ....

The Atlanta Constitution, page 1, Wednesday, May 2, 1984.

Caldwell likely to quit Thursday

Staying on job could cost Labor chief his pension

Despite his conviction on fraud conspiracy charges, state Labor Commissioner Sam Caldwell could walk off the job today with an immediate and lifetime state pension of at least $35,760 a year....

But if he stays and risks impeachment by the General Assembly, he could lose it all. The new Georgia Constitution contains a provision that allows the Legislature to deny pension benefits to an impeached state official....

Continued on page 10-A.

House Speaker Tom Murphy (D-Bremen), after meeting with Caldwell Tuesday afternoon, said he believes Caldwell will step down.

"I got the impression he agreed with me (that he should step aside) though he did not say that," Murphy

said. "I really believe Mr. Caldwell has so many old friends in the General Assembly that he doesn't want to put them on the spot. Caldwell asked that a decision to call a special impeachment session be postponed until Thursday, Murphy said.

The Atlanta Constitution, Editorial Page, page 18-A, Thursday, May 3, 1984.

Lessons from Teacher Caldwell

The Sam Caldwell experience has been a shameful one for the state. But it also has been instructive. It has shown clearly that we would fare better with a strong two-party system.

Labor Commissioner Caldwell was protected almost to the bitter end by the muscular Democratic establishment - long after it had been proved that his Labor Department was in shambles.

More than 30 of his employees were indicted in 105 separate federal and state indictments. Many were convicted or pleaded guilty to a wide range of charges of official misconduct involving the commissioner himself. And the Democratic Party chieftains refused to take corrective action....

CERTIFICATE OF SERVICE

I hereby certify that I have this day served upon opposing counsel a true and correct copy of the foregoing Petit, by depositing same in the United States Mail, wi adequate postage thereon, addressed as follows:

Michael Bowers, Esquire
Attorney General
State Judicial Building
Atlanta, Georgia 30334

Kenneth L. Shigley, Esquire
Van Gerpen & Rice
Post Office Box 724508
Atlanta, Georgia 30339

This day of March, 1985.

/S/John H. Howkins
Esquire, Attorney
Petitioner Pro Se
(404) 355-7751 (H)
(404) 656-3035 (W)

Mailed this date with adequate postage thereon, as listed above.

/S/John Myer, Esquire
Member of the Bar
Supreme Court
Suite 1515, Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303
(404) 522-1934

/S/John H. Howkins
Esquire, Attorney
Petitioner Pro Se

Office-Supreme Court, U.S.
FILED
APR 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN H. HOWKINS, Esq.,
Petitioner,

v.

SAM S. CALDWELL AND J. FREEMAN RAILEY,
EACH & BOTH, INDIVIDUALLY & OFFICIALLY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT CALDWELL'S BRIEF IN OPPOSITION

EARL J. VAN GERPEN
Counsel of Record
KENNETH L. SHIGLEY

VAN GERPEN & RICE
Post Office Box 724508
Atlanta, Georgia 30339-1508
(404) 952-8822

Counsel for Respondent
Sam S. Caldwell

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QUESTIONS PRESENTED

1. Whether the state employee's claims of constitutional infringements, not raised in the administrative hearing process or state court appeal, and expressly waived in open court in the state court appeal, are precluded by res judicata and collateral estoppel?

2. Whether the employee's insubordinate, disruptive and abrasive expressions in the workplace are protected by the free speech clause of the First Amendment?

3. Whether a federal court can take judicial notice of bare allegations of political relationships and intrigues, without any evidence thereof in the record?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1557

JOHN H. HOWKINS, Esq.,
Petitioner,

v.

SAM S. CALDWELL AND J. FREEMAN RAILEY,
EACH & BOTH, INDIVIDUALLY & OFFICIALLY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT CALDWELL'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Court of Appeals affirmed without opinion (Pet. App. 13) and denied a motion for rehearing (Pet. App. 14). The decision and order of the district court is reported at 587 F. Supp. 98 (1983). The state court decision and order (Pet. App. 12) and the underlying State Personnel Board order (Pet. App. 11) and hearing officer's decision (Pet. App. 10), are unpublished.

STATEMENT OF THE CASE

This case arises from the demotion of the Petitioner from Chief Hearing Officer to Hearing Officer in the Unemployment Insurance Services Division of the Georgia Department of Labor, due to insubordination and managerial incompetence. The Respondents were formerly the Georgia Commissioner of Labor and the Chief of the Employment Security Agency of the Georgia Department of Labor, respectively.

For clear understanding of the issues, the Court should know the evidence presented at the administrative hearing in support of the demotion, summarized in the Findings of Fact entered by the State Personnel Board's hearing officer (Pet. App. 10).

A. The Record and Decision and the State Personnel Board.

The first ground for demotion was insubordination involved in the Petitioner's refusal to respect binding precedents of the Board of Review, which is the highest administrative review body of the Employment Security Agency, Georgia Department of Labor. (Resp. App. 1; Pet. App. 10). There was evidence that the Appellant challenged a decision of the Board of Review in a very abrasive manner (SPB-105),[1] and had a "heated exchange" with members of the Board of Review denying the precedent-setting authority of the Board of Review. (SPB-295-97). He defied a precedent set by the Board of Review by entering a ruling directly contrary to such precedent (SPB-380, 381),

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[1] References to the State Personnel Board hearing transcript, which is not reproduced herein due to its length, will be designated "SPB," followed by the page number of the transcript.

and directed at least one other Hearing Officer under his supervision to similarly disregard Board of Review precedent. (SPB-37).

The second ground for demotion was Appellant's ineffectiveness and inefficiency as a supervisor. There was much evidence of the Appellant's vacillation and inconsistency as a manager, often reversing policies from day to day, and contributing to unnecessary stress and poor morale among his subordinates. (SPB-69, 70, 91, 102, 243, 250, 334). He disregarded equipment purchasing procedures by ordering recording equipment without prior authorization. (SPB-359). He apparently exercised "management by intimidation," as evidenced by such incidents of rudeness as turning and walking off without speaking when introduced to a new Hearing Officer on his staff (SPB-319), reprimanding one Hearing Officer in the presence of another Hearing Officer (SPB-237), screaming at subordinates (SPB-237), and walking out of a room in the middle of a conversation with another Hearing Officer to avoid a discussion. (SPB-335). At times he talked to Hearing Officer subordinates in a derogatory fashion about other Hearing Officers. (SPB-240, 320). He refused to give subordinates their regular performance evaluations, to which they were entitled, but instead tore up the evaluations and threw them in the trash. (SPB-332). The Appellant apparently suffered from a severe inability to concentrate his attention on discussion of cases, and that difficulty increased with time after he became Chief Hearing Officer. (SPB-253, 254). His poor human relations and communications skills led to unnecessary friction among his staff, which improved dramatically after his demotion. (SPB-261, 326). He so poorly admin-

istered the caseload of the Hearing Officers under his supervision that files got stuck on his desk for long periods, delaying release of decisions (SPB-337, 338). When his successor took over after his demotion, there was a backlog of 666 untyped decisions, 248 of which were over 75 days old, and no case reports had been sent to Archives (as required by Federal Court Order) in six months. (SPB-357, 358). The Petitioner was generally considered a poor leader and poor manager. (SPB-108, 261).

The State Personnel Board hearing officer entered findings (Pet. App. 10) which were approved by the Board (Pet. App. 11).

B. The State Court Appeal.

In his appeal from the State Personnel Board to the Superior Court of Fulton County, the Petitioner raised no constitutional issues in his pleadings (Resp. App. 2) and waived all constitutional claims in open court (Pet. App. 12).

C. The District Court Action.

The Petitioner then filed a civil rights action in United States District Court (Resp. App. 3), upon which the court granted summary judgment in favor of the Respondents. *Howkins* v. *Caldwell*, 587 F. Supp. 98 (1983). There remains pending in District Court a claim of alleged retaliation, which the Petitioner added by amendment while the Respondents' Motion for Summary Judgment was under advisement. Proceedings in the retaliation claim have been stayed pending the present appeal.

D. The Decision of the Court of Appeals.

On appeal to the Eleventh Circuit Court of Appeals, the Petitioner argued only the applicability of res judicata and collateral estoppel, and the distinction between "any evidence" and "substantial evidence" standards of review, omitting and waiving all other issues. (Resp. App. 4, 5).

ARGUMENT

I. The Petition is Deficient and Should be Summarily Denied.

A. There are no "special and important reasons" for discretionary review.

None of the issues argued by the Petitioner involve conflicts between circuits, conflicts between federal and state courts, departures from the usual course of judicial proceedings, or important federal law questions requiring initial consideration. Therefore, the Supreme Court should not allocate time and resources to a discretionary review of this case. Sup. Ct. R. 17.

B. The Petitioner seeks new determinations of issues of fact, including some apparently never alleged in the proceedings below.

The Petitioner makes numerous crucial factual contentions apparently never alleged, presented or considered below, and which are totally unsupported in the record in this case. For example, he states without support that the State Merit System hearing officers "could be fired at any time and told to move out before sundown," (Pet. 36-37), that evidence against the Petitioner was "created" (Pet. 19-20), that all

the witnesses against the Petitioner had a "very close relationship" with Mr. Caldwell (Pet. 15), and that Mr. Caldwell's "only mistake" was that he supported the wrong candidate for governor (Pet. 18). Woven throughout is an elaborate conspiracy theory never supported by evidence in the lower courts.

The Petitioner had ample opportunity to conduct discovery in the state court and district court proceedings and obtain evidence to support these allegations, if they could be supported, and he failed to do so. There is no record in this case to support such allegations. Now he seeks a "second bite at the apple" by asking the Supreme Court to act as the finder of fact on matters that were either not raised, or decided adversely to him, in the courts below. That is not the usual job of the Supreme Court. The Petition should be denied. *See, e.g., United States* v. *Shubert,* 348 U.S. 222 (1955).

C. Lacking "accuracy, brevity and clearness," the Petition should be denied.

The Petition for Certiorari is 52 pages long, excluding subject index, table of authorities, verbatim quotations and lengthy appendices. It contains a rambling narrative of the personal recollections of the Petitioner and lengthy innuendos of immaterial matters involving this Respondent and recent Georgia political history. There is some limited reference to the record of this case, but much reference to unrelated newspaper articles, editorials and rumors about the Respondent. For failure "to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring

consideration," the Petition should be denied. Sup. Ct. R. 21.1(8), 21.4, 21.5.

D. Burdened with "irrelevant, immaterial and scandalous matter," the Petition should be denied.

The Petition contains 18 pages of reproductions of newspaper articles and pleadings in criminal cases, and six pages of unsupported narrative on Georgia politics, all of which are "burdensome, irrelevant, immaterial and scandalous matter" as to this action. The Court should disregard, strike and deny the Petition. Sup. Ct. R. 34.6.

II. The Petitioner's Claim of Bias on the Part of the State Personnel Board's Hearing Officer is a Bare Allegation, not supported by evidence, and was waived by omission from the appeal to the Eleventh Circuit.

The chief issue which the Petitioner has raised in this Court is the alleged lack of an unbiased hearing examiner. The district court's pithy ruling on this issue is adequate:

> "Clinging to the last straw, Howkins beckons this court to conclude on innuendo alone that Hearing Officer Theus, who presided over Howkins' hearing, was not impartial. In support of this claim Howkins asks this court to take judicial notice of the following: [wherein the Court lists six contentions of political and bureaucratic intrigue]. And the list goes on. These are not matters of which this court can take judicial notice. In addition, the record is totally devoid of any facts supporting these bald allegations. There is nothing in that transcript to support Howkins' claim that the hearing was conducted in a biased or prejudiced manner that affected his rights. . . . Accord-

ingly, this court considers this claim to be meritless."

Howkins, 587 F. Supp. at 107, 108.

The Petitioner omitted this issue from his appeal to the Eleventh Circuit (Resp. App. 4), and by such omission waived its further consideration.

III. Insubordinate, Disruptive and Abrasive Expressions in the Workplace are not Protected by the First Amendment.

Speech closely connected with insubordination is not protected by the First Amendment. *Williams* v. *Day,* 553 F.2d 1160, 1162 (8th Cir., 1977). Neither is speech which interferes with the operation of the workplace. *Sprague* v. *Fitzpatrick,* 546 F.2d 560, 565-66 (3d Cir., 1976), *cert. denied,* 431 U.S. 937 (1977); *Kannisto* v. *City and County of San Francisco,* 541 F.2d 841, 844 (9th Cir., 1976), *cert. denied,* 430 U.S. 931 (1977); *Schneider* v. *City of Atlanta,* 628 F.2d 915, 919 (5th Cir., 1980); *Phillips* v. *Adult Probation Dept.,* 491 F.2d 951, 954-55 (9th Cir., 1974). When an employee's abrasive personality and unsatisfactory work performance alone justify a termination or demotion, a mere allegation by the employee that his exercise of free speech motivated the action will not save him. *Mt. Healthy School Dist. Board of Education* v. *Doyle,* 429 U.S. 274, 287 (1977); *Hillis* v. *Steven F. Austin State University,* 665 F.2d 547, 551-2 (5th Cir.), *cert. denied,* 457 U.S. 1106 (1982).

As noted by the district court, the Petitioner's conduct was insubordinate, interfered with the operations of his superiors on the Board of Review, and disrupted the working environment of his subordinates. The Petitioner was unable to support his naked

contention that but for his insubordinate act (which he characterized as protected speech), he would not have been demoted. *Howkins,* 584 F. Supp. at 107.

IV. Res Judicata and Collateral Estoppel Bar the Petitioner's Claim.

The district court found that the Petitioner's present federal action is barred by the preclusive doctrines of res judicata and collateral estoppel, consistent with the applicable rules of Georgia law and constitutional requirements of due process. *Howkins* v. *Caldwell, et al.,* 587 F. Supp. 98 (1983). *See, Allen* v. *McMurray,* 449 U.S. 90 (1980) ("Allen"); *Kremer* v. *Chemical Construction Corp.,* 456 U.S. 461 (1982) ("Kremer"); *Haring* v. *Prosise,* 462 U.S. 306 (1983) ("Haring"); and *Migra* v. *Warren City School Dist. Bd. of Education,* 104 S.Ct. 892 (1984) ("Migra").

> "[S]tate proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full-faith-and-credit guaranteed by federal law. . . . [W]e must bear in mind that no single model of procedural fairness, let alone a particular form and procedure, is dictated by the Due Process Clause."

Kremer, 456 U.S. at 481, 482. *Accord, Migra,* 104 S.Ct. at 896.

"What the Fourteenth Amendment does require . . . is an opportunity granted at a meaningful time and in a meaningful manner . . . for a hearing appropriate to the nature of the case." *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422 (1982).

A. Review of the Entire Record Shows That The Evidence Was Sufficiently Substantial To Satisfy Requirements of Due Process and Give The State Court Judgment Preclusive Effect.

The "substantial evidence" test is "quintessentially a case-by-case analysis requiring review of the whole record." *Calhoun* v. *Bailar,* 626 F.2d 145, 148 (9th Cir., 1980), *cert. denied,* 452 U.S. 906 (1981); *Connor* v. *U.S. Civil Service Comm.,* 721 F.2d 1054 (6th Cir., 1983). Generally, the application of the "substantial evidence" test in the civil service employment context consists of a review of whole record to determine whether basic procedural requirements have been satisfied and whether the agency's action was based on substantial evidence, as opposed to being arbitrary or capricious. *See Charlton* v. *United States,* 412 F.2d 390 (3rd Cir., 1969), *cert. denied,* 409 U.S. 1027 (1972). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Home Health Services of the U.S., Inc.* v. *Schweiker,* 683 F.2d 353, 356 (11th Cir., 1982). *See also, Boylan* v. *U.S. Postal Service,* 704 F.2d 573 (11th Cir., 1983), *reh. denied,* 709 F.2d 716, *cert. denied,* 104 S.Ct. 1916 (1984).

Review of the whole record in this case shows that evidence presented to the Georgia State Personnel Board was substantial, indeed more than ample to support demotion from a supervisory position to one which did not involve management and supervision of other Hearing Officers and staff.

The "substantial evidence" test is not a technical requirement to be mechanically applied by the Court below. It is a broad standard of due process to be con-

sidered by an appellate court in review of the whole record.

Even assuming *arguendo* that "substantial evidence" is a mechanical test for the trial court, the evidence to justify demotion in this case is so substantial that application of the "any evidence" standard pursuant to *Hall* v. *Ault,* 240 Ga. 585 (1978), if in error, did not defeat substantial justice or affect the substantial rights of the Appellant. If error at all, it was harmless and not reversible. Fed. R. Civ. P. 61.

B. The Petitioner Did Have a Full and Fair Opportunity To Litigate All Issues In the Georgia Courts, and Freely Waived That Right.

Even if the question of constitutionality of the "any evidence" rule prescribed in *Hall* v. *Ault,* 240 Ga. 585 (1978), were not pretermitted by the substantiality of evidence in the record, which renders it harmless, Petitioner fails to show any reason why all issues, including constitutional ones, could not have been fully and fairly litigated in the Georgia courts.

Contrary to the Petitioner's contention, Georgia law would permit the Superior Court to consider constitutional claims of violation of due process resulting from bias of the hearing officer or improper makeup of the State Personnel Board, even if not raised in the administrative hearing. That would have required the Petitioner to present evidence to support those claims, rather than relying upon bald allegations, as provided by Official Code of Georgia Annotated § 50-13-19(g):

> "The review shall be conducted by the Court without a jury and shall be confined to the record. *In cases of alleged irregularities in procedure before*

> *the agency, not shown in the record, proof thereon may be taken in the Court. . . .*" O.C.G.A. § 50-13-19(g). (emphasis supplied)

The Fifth Circuit, in *Nilson* v. *City of Moss Point, Miss.,* 701 F.2d 556 (5th Cir., 1983), held that "res judicata . . . bars all claims that were *or could have been* advanced in support of the cause of action on the occasion of its former adjudication." Citing *Allen* v. *McCurry,* 449 U.S. 90 (1980), the court in *Nilson* held that multiple remedies for a given wrong must be asserted together, not serially. *Nilson,* 701 F.2d at 560.

In *Eliason Corp.* v. *Bureau of Safety & Regulation,* 564 F. Supp. 1298 (W.D. Mich., 1983), the court held that res judicata and collateral estoppel preclude relitigation in a federal proceeding under 28 U.S.C. § 1983 of issues which either were, or might have been, litigated in prior state proceedings. *See also, Southern Jam, Inc.* v. *Robinson,* 675 F.2d 94 (5th Cir., 1982).

The case of *Miller* v. *Hartwood Apts.,* 689 F.2d 1239 (5th Cir., 1982), upon which Petitioner relied in the Eleventh Circuit, is inapposite. In *Miller,* the Mississippi Justice of the Peace Court had jurisdiction to determine only possessory rights, and lacked jurisdiction to consider any equitable or constiutional issues. *Id.* at 1242. The Superior Court of Fulton County, Georgia, on the other hand, is a court of general jurisdiction in law and equity which could have considered any issues the Appellant might have chosen to raise. Const. of the State of Georgia, 1983, Art. 6, § 4, ¶ 1; Official Code of Georgia Annotated § 15-6-8. It cannot be assumed that the Superior Court of Fulton County or the Supreme Court of Georgia

would not have seriously considered a well-reasoned constitutional argument fairly related to evidence in the record of the case.

The Petitioner, who is a licensed attorney and experienced quasi-judicial Hearing Officer, proceeded *pro se* in Fulton Superior Court. He did not raise any constitutional issues in his pleadings (Resp. App. 2), and expressly waived any constitutional claims in open court. (Pet. App. 12). "The fact that (the Petitioner) failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer,* 456 U.S. at 485.

C. The Petitioner's Action Is Barred by Applicable Georgia Rules of Preclusion.

Federal courts must apply state preclusion rules in actions filed pursuant to 28 U.S.C. § 1983, insofar as their application is not inconsistent with minimal standards of due process. *Migra,* 104 S.Ct. at 898.

Georgia law recognizes three forms of preclusion by prior adjudication, *Lowe Engineers, Inc.* v. *Royal Indemnity Co.,* 164 Ga. App. 255 (1982):

> (1) "The doctrine of res judicata arises from a judgment of a court of competent jurisdiction as between the same parties of their privies as to all matters put in issue, or which under the rules of law *might have been put in issue,* in the cause in which the judgment rendered."
>
> (2) "A plea of estoppel by judgment . . . stems from the doctrine of res judicata where there has been a former adjudication of the same issues by the same parties or their privies, even though the adjudication may not have been upon the same

cause of action. . . . Estoppel by judgment is sometimes referred interchangeably as collateral estoppel or as . . . estoppel by judgment.

(3) The doctrine of binding precedent "provides where the issue of liability has previously been adjudicated with negative results for a party contending for the same rights in subsequent litigation, even though not res judicata, estoppel by judgment nor collateral estoppel as to the present action, because the parties are different, does constitute binding precedent, inasmuch as the controlling issue . . . has already been adjudicated under substantially similar allegations." *Id.* at 258-9. (emphasis supplied)

The Petitioner's cause of action is thus precluded under Georgia law. The Respondents are in this case only by virtue of their roles as former officials of the Georgia Department of Labor, and their defense herein is provided by the State of Georgia; their privity with the Georgia Department of Labor cannot be seriously disputed. This case is based upon the same situation which was involved in the Superior Court proceeding.

The Petitioner had ample motivation to fully litigate all issues, constitutional and otherwise, in the state court proceeding. *Haring, supra.* Thus, Georgia law would give the Superior Court judgment *res judicata* effect as to any issues which were or might have been raised in that proceeding. Alternatively, the former adjudication of the same matters in an action between the same parties or privies, although not on the same cause of action, would invoke estoppel by judgment under Georgia law. Finally, the third doctrine of preclusion under Georgia law, the doctrine of binding precedent, could preclude the Petitioner from attempt-

ing to relitigate the central issue of the propriety of his demotion and the due process of procedures involved therein.

D. The Petitioner had all the process that was due him.

The Petitioner fails to show how he could have been harmed by any alleged deficiency in the proceedings in the state court. He had a full opportunity to litigate all issues, failed to raise any constitutional issues in his pleadings there, and expressly waived all constitutional issues in open court. While the state court referred to the "any evidence" rule set forth in *Hall* v. *Ault, supra* (Resp. App. 5), review of the whole record shows that the result could not have been different if a "substantial evidence" rule have been cited.

V. The Doctrine of Qualified Good Faith Immunity Supports the Judgment.

In *Davis* v. *Scherer,* 104 S.Ct. 3012 (1984), this Court reasserted the qualified good faith immunity of public officials from § 1983 liability in the context of disciplinary discharge of a public employee. *See also Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982); *Butz* v. *Economou,* 438 U.S. 478 (1978); *Wood* v. *Strickland,* 420 U.S. 308, 320 (1975).

The test of qualified immunity depends upon "objective reasonableness of (the officials') conduct as measured by reference to clearly established law" and "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818.

The record in the instant case does not show any violation of clearly established rights of which a reasonable person would have known. On the contrary, the record shows that the heavy weight of the evidence presented to the State Personnel Board was to the effect that Howkins was insubordinate in that he deliberately disregarded precedents of the Board of Review in his work as a Hearing Officer, and that he was an exceptionally incompetent manager, totally incapable of properly handling his supervisory responsibilities. Thus, his demotion from a supervisory position to a non-supervisory position was fully justified. (Pet. App. 10).

Subjective motives of the Respondents, if any, are immaterial, as the demotion was objectively reasonable under existing law in light of the Petitioner's totally unsatisfactory job performance in his supervisory capacity, pursuant to Georgia State Personnel Board Rules and Regulations ¶ 15,203, which provides for demotion due to negligence or inefficiency. Mere irregularity in following State Personnel Board procedures would not remove the Appellee's immunity. *Davis, supra.*

VI. Conclusion.

The Petitioner could have fully li igated his claims of violation of free speech and due process in the Georgia courts, simply by taking the trouble to present evidence and develop a record upon which the state courts could rule. For whatever reason, he chose to proceed in both state and federal courts on the basis of bald allegations and innuendo, unsupported by any evidence, apparent'y relying solely upon ad-

verse publicity about this Respondent to carry his case for him.

The conduct of the Petitioner, which he asserts was constitutionally protected speech, was mere unprotected insubordination and disruption of the workplace. There was substantial evidence of insubordination and managerial inefficiency and incompetence to support his demotion from a supervisory position to one involving no supervisory responsibilities. Rather than complaining of his demotion he should be thankful that he was not fired.

Therefore, certiorari should be denied.

Respectfully submitted,

EARL J. VAN GERPEN
Counsel of Record
KENNETH L. SHIGLEY

VAN GERPEN & RICE
Post Office Box 724508
Atlanta, Georgia 30339-1508
(404) 952-8822

Counsel for Respondent
Sam S. Caldwell

April 1985

APPENDIX

APPENDIX 1

Letter from Sam Caldwell to John H. Howkins, March 6, 1981

GEORGIA DEPARTMENT OF LABOR
EMPLOYMENT SECURITY AGENCY
Atlanta

* * *

March 6, 1981

Mr. John H. Howkins
Georgia Department of Labor
254 Washington Street, S.W.
Atlanta, Georgia 30334

Dear Mr. Howkins:

By this letter, I acknowledge receipt of your Responses dated March 4, 1981, and March 6, 1981 respectively.

This letter is to notify you of the final action of your demotion from Administrative Hearing Officer IV on paygrade 39 to Administrative Hearing Officer III on paygrade 36, to become effective at the close of business March 9, 1981. This action is being taken pursuant to Rule 15 of the Rules and Regulations of the State Personnel Board, due to your negligence or inefficiency in performing assigned duties; inability or unfitness to perform assigned duties; and misconduct.

The specific reasons for this final adverse action are:

(1) Your inability to perform assigned duties in that on December 1, 1980, you challenged a decision of the Board of Review. As you are aware, the Board of Review is, by law, the highest administrative review body within the Employment Security Agency of the Georgia Department of Labor.

(2) Inability to supervise employees of your section. On several occasions high level Hearing Officers have threatened to resign due to your lack of leadership. Your moment-to-moment or day-to-day changing of instructions to Hearing Officers has led to frustration among the employees of the Appeals Section to the point that there have been physical and emotional problems with employees.

You have the right to appeal this determination to the State Personnel Board pursuant to Rule 14 of the Rules and Regulations of the State Personnel Board, by filing an appeal in writing with the Commissioner of the State Merit System within fifteen (15) calendar days from the date you receive this letter or the date of the proposed action, whichever is later. Failure to file an appeal within the specified time will result in the waiver of all further appeal rights including any appeal to the State Personnel Board.

I consider any of the specific reasons set forth above to warrant the actions taken by this letter. If you fail to perform your duties as Administrative Hearing Officer III, more severe disciplinary actions will be taken.

Sincerely,

/s/ SAM CALDWELL
Sam Caldwell
Commissioner of Labor

jj

cc: Ms. Farris N. Freeman
Mr. J. Freeman Railey
State Merit System
Payroll Section

APPENDIX 2

Petition for Review of Decision of Georgia State Personnel Board, John H. Howkins, Administrative Hearing Officer IV, Plaintiff vs. Georgia Department of Labor, Superior Court of Fulton County, State of Georgia, Civil Action No. C-77793

* * * *

I. JURISDICTION

The Petitioner files this Petition for Review and Revocation of the Decision of the State Personnel Board of the State of Georgia, Case #81-124, under authority of 40 GA Code Ann. 2207.1(i). The decision was rendered on July 22, 1981, attached hereto, and upheld the demotion of Petitioner contrary to the law and evidence in the case.

II. GROUNDS

1. Under 40 GA Code Ann. 2207.1(a) and (b), the State Personnel Board is entitled to conduct hearings on "a dismissal or other purported violation of the rules and regulations of the several departments . . ."

By the language cited, the only ground permitted in support of a downgrade action is "violation of the rules and regulations" of the Department to which Petitioner was assigned, i.e. the Georgia Department of Labor. However, no rule nor any regulation has been cited either in charges or in the Findings of Fact published by the Hearing Officer.

2. (a) A finding was made that Petitioner issued instructions "to do something one way one day and would have the instructions changed the next day" and that this created attitude problems. The Finding states only part of the facts and ignores others in that this changing occurred mostly when schedules had to be changed to accommodate unexpected absences of hearing officers, and they also occurred as a result of pressures brought about by disagreements

between hearing officers and the schedule clerk (Transcript Page 327, Line 10-14) because hearing officers were under pressure to work full schedules. Hearing officers also argued against the requirement established by Petitioner that they keep up their own precedent manuals, and Petitioner agreed at one time that they could use the office copy. However, when it was found that none of them would read the office copy the order was changed to require them to resume filing in their own individual manuals. No rule or regulation of the Deaprtment or instruction from a superior was involved.

2. (b) The hearing officer complaint that Petitioner was "constantly talking to the hearing officer" has no basis in the evidence and ignores the fact that Petitioner was trying to control problems caused by that hearing officer (Transcript Page 342, Line 11-23), (Page 240, Line 22), (Page 455, Line 14), (Page 400, Line 4-10), and (Page 401, Line 11-21).

3. That Petitioner "was at times indecisive, argumentative towards; generally (Petitioner) seemed to have opinions that differed from other staff members, many of whom had twenty (20) or more years of service;..." This Finding cites no rule or instruction that was violated and ignores the Fact that the arguments were concerned with the correct application of law controlling the Department of Labor (Transcript Page 127, Line 24), all of which arguments of Petitioner have been vindicated to date save only as to the "Pike" decisions. As to the Fantroyal decision, Petitioner forewarned his supervisor (Page 390, 391, and 392) that guidelines should be prepared as the Federal Judge would almost surely require them. There were other incidents where Petitioner used his expertise to show the correct application of law such as following a state decision, contrary to argument raised by Department counsel (Page 40, Line 2-8) (contradicted at Page 410-413) (Page 47, Line 17—Page 52, Line 1). (Also see letter attached). The pressure was kept up by Mr. J. Freeman Railey's harrassment, causing great difficulty in Petitioner's management

of the Section (Page 396-397), (Page 415-423, Line 13), (Page 443, Line 13,—Page 444), and (Page 95, Line 15) (contra at Page 245, Line 4). Mr Railey issued conflicting instructions to Petitioner's subordinate without prior notice to Petitioner (Page 122-123).

4. This finding departs from the charges and fails to recognize priority assignments and Petitioner's reprimand to the office manager. Extra personnel hours were required and budgets were under tight restriction at the time.

5. (a) The Board of Review was asked by Petitioner to set up a system of precedence so that conflicts in their decisions could be brought under control (Page 404, Line 13). Petitioner was not nor has at any time been abrasive with the Board. Petitioner never "approached the Board" on the subject of the Pike decisions but was summoned and questioned about his opinion, which questions he answered (Page 403, Line 22,—Page 405, Line 4). Mr. Railey contradicted by Board member Brady's testimony (Page 295, Line 16) (Mr. Railey at Page 105, Line 18-23). Petitioner in response to Board questions, replied "No that is not my understanding" (Page 307, Line 14-20). Board members found no difficulty in getting along with Petitioner (Page 308, Line 7) and (Page 316, Line 11). Board member does not know whether or not Board is a precedent board (Page 313, Line 12).

5. (b) Petitioner wrote memo to Mr. Railey about legal errors in "Pike" decisions and did so at the request of Mr. Railey (Page 457, Line 8-10).

III. PROCEDURES

Petitioner further shows the Court that errors were committed in the conduct of the Hearing by Reese Theus the Hearing Officer as follows:

1. Petitioner was denied (off record) an opportunity to join in his own defense as co-counsel and was again denied

this opportunity on the record (Page 137, Line 20-22). Such denial is contrary to the code provision requiring that "The Board shall give effect to the rules of privilege recognized by law." 40 GA Code Ann. 2207.1(d)(1).

2. Hearsay exclusions were improperly applied in numerous cases; examples are:

(a) Petitioner was not permitted to quote his supervisor, but supervisor frequently was allowed to quote Petitioner upon cross examination. Mr. Jones states (at Page 442, Line 10), "I will object to anything Mr. Railey said." The objection was sustained. Thus Petitioner was placed under a gag rule. Petitioner's subordinate was allowed to quote Petitioner, over objection (Page 329, Line 10-19). Mrs. Margaret Kohn was then allowed to load the record with half truths and innuendo, Petitioner attempted to further quote his adversary but objection was sustained (Page 393, Line 13). The hearsay rule was explained before the hearing officer but quoting the opposite side was ruled to be subject to exclusion (Page 394, Line 20-24).

(b) The Hearing Officer compounded hearsay by developing further hearsay evidence after objection was taken by Petitioner (Page 69-71).

3. Cross examination (Offer of Proof) was denied by Hearing Officer. (Page 78, 79, and 80). This made it unfairly difficult to show that confusion in the Appeals Section was generated from higher supervision. Cross examination was denied to show intent to cause confusion by memo written contrary to the rule of law, as given by Federal and State decision.

4. Testimony and evidence as to memo from Commissioner of Labor were accepted to show that instructions were issued before the alleged misconduct when the memo was actually issued after action complained of (Page 105, Line 9-15).

5. There was no showing of prior warning of any kind, but most of the testimony (all of the testimony from subordinates) complained of incidents that occurred more than a year prior to the notice of downgrade (Page 255, Line 1). Subordinate hearing officers complained about a clerk who left the Appeal Section in May, 1981. Other incidents were presented to Mr. Railey nine months to two years prior to the notice to Petitioner, but Petitioner continued to be rated "above average" in performance. His conferences with Petitioner were not unusual (Page 115, Line 2-12). Hearing officers in the Appeal section thus were allowed to air personal feelings, most of which showed objection to following legal methods.

6. Contradictions in evidence offered against Petitioner were not considered as affecting the probative value of such testimony and were otherwise ignored: "Mr. Howkins had approached the Board" (Page 105, Line 18-23) by Mr. Railey "Let's call Mr. Howkins up now" (Page 295, Line 16) by Board Member Brady. Also Page 29, Line 18 is contradicted at Page 73, Line 7-8).

7. The Merit system has made a promotion by negotiation, showing illegal preference and now attempts to justify a demotion similarly as a favor to an operating official, in violation of Plaintiff's Constitutional rights under the 14th Amendment of the Constitution.

WHEREFORE, Plaintiff prays:

(a) That summons and process issue as provided by law.

(b) That Plaintiff be granted an Order of full reinstatement.

(c) That this Court grant any other and further relief it deem proper in the premises.

(d) That Service of Process be perfected by serving:

State Personnel Board
244 Washington Street, SW
Atlanta, Georgia 30334

and

Commissioner of Labor
Georgia Department of Labor
254 Washington Street, SW
Atlanta, Georgia 30334

/s/ JOHN H. HOWKINS
John H. Howkins
Attorney for Plaintiff

2954 Rockingham Drive, NW
Atlanta, Georgia 30327

APPENDIX 3

Complaint in John H. Howkins v. Sam S. Caldwell, et al., United States District Court, Northern District of Georgia, Atlanta Division, Civil Action File No. C82-2308A

* * *

COMPLAINT

Plaintiff sues defendants Sam S. Caldwell and J. Freeman Railey and alleges:

1.

This action is brought and the Court has jurisdiction pursuant to the 14th Amendment of the Constitution, 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331 and 1343.

2.

Defendant Caldwell is and has been at all times relevant herein Commissioner of the Department of Labor of the State of Georgia, and is sued in his individual and official capacity.

3.

Defendant Railey is and has been at all times relevant herein Unemployment Insurance Division Director of the Employment Security Agency of the Department of Labor of the State of Georgia, and is sued in his individual and official capacity.

4.

Both defendants are subject to the jurisdiction and venue of the Court.

5.

In April, 1970, plaintiff was employed as an Appeals Referee with the Employment Security Agency of the

Georgia Department of Labor. In approximately July, 1977, plaintiff was promoted to Chief Administrative Hearing Officer for such agency, a position held by plaintiff until approximately December 8, 1980.

6.

In such position, plaintiff was in the classified service of the State of Georgia and subject to the provisions of the State Merit System.

7.

Throughout the period alleged in paragraph 5 above, plaintiff received various and periodic performance ratings ranging from good, to very good, to excellent.

8.

On or about December 4, 1980, an attorney of the Employment Security Agency improperly, unethically, and unlawfully attempted to influence a decision of an Appeals Referee under the supervision of plaintiff in a case involving the discharge of a Department of Labor employee, wherein the said attorney appeared as an advocate and representative of the Department of Labor against the discharged employee, when at the time, before, and thereafter, said attorney, under the direction of defendants, was actively and continuously training and instructing Appeals Referees of the Employment Security Agency, including the said Appeals Referee.

9.

On or about December 4, 1980, plaintiff, pursuant to his professional obligations, duly made a protest to defendant Railey concerning the conduct of said attorney, as described above, and requested that said attorney be removed from the case.

10.

On or about December 8, 1980, defendants removed plaintiff from his position as Chief Administrative Hearing Officer and demoted him to a position of Appeals Referee.

11.

Defendants' acts of removing and demoting plaintiff, as alleged herein, were done:

a. In retaliation for plaintiff's protest and request as alleged in paragraph 9 above;

b. Arbitrarily, capriciously, and in bad faith;

c. Under color of statute, ordinance, regulation, custom or usage of the State of Georgia;

d. Willfully, conspiratorily, and maliciously.

12.

Defendants' acts, as alleged herein, had and continue to have the direct, intended, and foreseeable consequences of inflicting on plaintiff great physical, emotional, and mental anxiety, humiliation, pain, and suffering.

13.

Defendants' removal and demotion of plaintiff, as alleged herein, constituted a denial of plaintiff's right to due process of law and of his rights of equal protection of the law in relation to a valuable property right of plaintiff.

14.

Plaintiff, if having any obligation to do so, has exhausted his administrative remedies; alternatively, plaintiff avers that efforts to exhaust his administrative remedies are and have been futile and in and of themselves a denial of his rights to due process and equal protection.

15.

Defendants continue maliciously and unlawfully to cause injury to plaintiff by obstructing and interfering with plaintiff in the performance of his job, including defendants' unlawful and improper efforts to influence plaintiff in his decsions as an Appeals Referee, thereby jeopardizing plaintiff's tenure, earnings, and retirement prospects.

WHEREFORE, plaintiff demands judgment for:

a. Compensatory damages in the amount of $50,000.00;

b. Punitive damages in the amount of $300,000.00 to deter defendants from such conduct in the future;

c. Special damages to be set forth subsequently by amendment;

d. Costs, interest, and attorney fees;

e. An order requiring defendants, their successors, and any persons acting in concert with them, to reinstate plaintiff to his rightful position as Chief Administrative Hearing Officer; make plaintiff whole for any and all losses occasioned by defendants' wrongful removal and demotion of plaintiff; and take all steps reasonably necessary to permit plaintiff to perform his rightful duties, including advising all appropriate persons of plaintiff's reinstatement;

f. Such other and further relief as may be deemed appropriate by the Court.

Further, plaintiff demands trial by jury.

/s/ Frank E. Specht
Frank E. Specht
Attorney for Plaintiff

550 RiverEdge One
5500 Interstate North Parkway
Atlanta, Georgia 30328
(404) 952-6550

APPENDIX 4

Excerpt from Table of Contents, Brief for Plaintiff-Appellant, John H. Howkins v. Sam S. Caldwell, et al., United States Court of Appeals for the Eleventh Circuit, Docket No. 84-8452

* * *

Argument

POINT I

The Doctrine of Preclusion Does Not Bar Plaintiff's Action 8

A. The "any evidence" test, as applied by the Georgia courts, does not meet minimal due process requirements and thus does not meet the "full and fair opportunity to litigate" qualification of *Allen* v. *McCurry*. Substantial evidence is the minimal requirement of due process 9

B. Plaintiff did not have a full and fair opportunity to litigate his due process claim in the state proceedings; the Georgia courts were unable or unwilling to protect plaintiff's federal rights; and plaintiff's due process rights were not something he "might have litigated" in the state proceedings 14

C. Neither the District Court nor defendants established that Georgia courts would apply preclusion in the circumstances of the instant case. 18

D. Any doubts as to the applicability of preclusion should be resolved against preclusion. Defendants had the burden of establishing preclusion but failed to sustain that burden 19

E. Preclusion is not applicable where the prior state proceedings, from which preclusion is asserted, did not consist of traditional or substantial involvement 21

F. Federal judicial policy considerations are persuasive to reject preclusion 23

APPENDIX 5

Excerpt from Table of Contents, Reply Brief for Plaintiff-Appellant, John H. Howkins v. Sam S. Caldwell, et al., United States Court of Appeals for the Eleventh Circuit, Docket No. 84-8452

• • •

Argument and Citation of Authorities 1

A. The issue here concerns the applicability or not of judicial, not administrative, preclusion. It is state judicial assurance of the existence or not of substantial evidence in administrative hearings that is required under applicable Supreme Court decisions. 1

B. The state court's application of the any evidence standard of review was not harmless error on any assertion that the any evidence standard is the same as, or equivalent to, the substantial evidence standard of review 4

C. That Plaintiff was afforded certain basic procedural rights at the administrative hearing does not nullify the requirement of state judicial assurance that the agency decision be supported by substantial evidence 6

D. Plaintiff's instituting of state court proceedings did not require that he exhaust state court appeals nor constitute any election, bar, or waiver of his federal rights 6

APPENDIX 6

Official Code of Georgia Annotated § 50-13-19, formerly Georgia Code Annotated § 3A-120

50-13-19. Judicial review of contested cases; venue, procedure, stay of agency decision, grounds, etc.

(a) Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This Code section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition within 30 days after the service of the final decision of the agency or, if a rehearing is requested, within 30 days after the decision thereon. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. When the petitioner is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of the county where the petitioner maintains its principal place of doing business in this state. All proceedings for review, however, with respect to orders, rules, regulations, or other decisions or directives of the Public Service Commission must be brought in the Superior Court of Fulton County. Copies of the petition shall be served upon the agency and all parties of record. The petition shall state the nature of the petitioner's interest, the fact showing that the petitioner is aggrieved by the decision, and the ground as specified in subsection (h) of this Code section upon which the petitioner contends that the decision

should be reversed or modified. The petition may be amended by leave of court.

(c) Irrespective of any provisions of statute or agency rule with respect to motions for rehearing or reconsideration after a final agency decision or order, the filing of such a motion shall not be a prerequisite to the filing of any action for judicial review or relief: provided, however, that no objection to any order or decision of any agency shall be considered by the court upon petition for review unless such objection has been urged before the agency.

(d) The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided in this subsection, the agency may grant, or the reviewing court may order, a stay upon appropriate terms for good cause shown. In contested cases involving a license to practice medicine or a license to practice dentistry in this state, a reviewing court may order a stay or an agency may grant a stay only if the court or agency makes a finding that the public health, safety, and welfare will not be harmed by the issuance of the stay.

(e) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(f) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence

be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. *In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.* The court, upon request, shall hear oral argument and receive written briefs.

(h) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (Emphasis supplied.)